STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

MATTHEW SOVA, JANE SNELL, JAMES LAMB, SCOTT KUCHAR, ADAM ENGEL, SAMANTHA ENGEL, and all those similarly situated in Saginaw County, Michigan,

Plaintiffs,

v.

CONSUMERS ENERGY COMPANY, and ARBORMETRIC SOLUTIONS, LLC,

Defendants.

Case No. 25-002533-CH
Honorable Julie Gafkay

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DEFENDANT CONSUMERS ENERGY COMPANY'S MOTION FOR SUMMARY DISPOSITION OF PLAINTIFFS' AMENDED COMPLAINT

Defendant Consumers Energy Company ("Consumers Energy"), by and through its attorneys, Miller, Canfield, Paddock and Stone, P.L.C., hereby moves this Honorable Court for an order granting summary disposition as to all claims against it under MCR 2.116(C)(8) and/or (C)(10). In support of its motion, Consumers Energy states:

1. Consumers Energy is a public utility heavily regulated by the Michigan Public Service Commission ("MPSC").

2. This case challenges Consumers Energy's MPSC-mandated vegetation plan that includes marking trees with bark paint and executing a systematic clearance cycle.

3. "[L]ine clearing or tree trimming is important" to the MPSC and a vital aspect of its "broad effort to improve the reliability of the state's power grid and to make it more resilient against the increasingly frequent and severe storms." Ex. 1, 9-5-25 MPSC Fact Sheet at 1-2. To that end, the MPSC requires utilities to "adopt and implement a program of maintaining adequate line clearance through the use of industry-recognized guidelines" that, among other things, "[i]ncludes tree trimming" and "[e]nsure[s] safety and reliability." Mich Admin Code, R 460.3505.

4. Tree bark painting is an instrumental part of the MPSC-mandated plan to not only ensure compliance with vegetation management standards, but to prevent tree crews from cutting down or trimming trees that are not part of the plan.

5. Plaintiffs don't like Consumers Energy's MPSC-mandated vegetation plan and accuse Consumers Energy and its contractor of entering their properties without their consent and "affix[ing] blue 'bark paint'" on their trees, which Plaintiffs claim "permanently alters the tree's appearance," and constitutes trespass, "wrongful interference with property rights," and statutory trespass to trees under MCL 600.2919. Am. Compl. ¶¶ 37, 39, 66-103.

6. Plaintiffs' unfounded attack necessarily implicates technical reliability standards, program metrics, and the MPSC's statewide oversight expectations. That is why Michigan courts have repeatedly recognized that in cases like this one, summary disposition is proper since the MPSC has primary jurisdiction over challenges to a public utility's operations, including tree marking, trimming, and removal.

7. The MPSC is "vested with the power and jurisdiction to regulate all rates . . . and all other matters pertaining to the formation, operation, or direction of public utilities" like Consumers Energy. MCL 460.6(1).

8. "The doctrine of primary jurisdiction recognizes this broad grant of authority," *Evans v Detroit Edison*, No. 239077, 2003 WL 21130167, at *2 (Mich Ct App, May 15, 2003), and comes into play whenever enforcement of a claim that is originally cognizable in the circuit courts "requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733 (2001).

9. Although there is no fixed formula for determining whether an administrative agency has primary jurisdiction, a court should consider several factors such as: "(1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 122; 715 NW2d 28 (2006).

10. The first factor—whether the matter falls within the agency's specialized knowledge—is clearly met because "[t]he meaning and application of rules governing

maintenance of overhead power lines, and tree trimming around those lines, by a public utility are matters of specialized knowledge best considered first by the MPSC." *Baker v Detroit Edison Co,* No. 246401, 2004 WL 2009260, at *2 (Mich Ct App, September 9, 2004). And tree marking with blue bark paint is an essential first step toward executing Consumers Energy's vegetation management plan.

11. The second factor—whether a decision here would interfere with the uniform resolution of similar issues—is also easily met since "the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers . . . ." See *Evans*, 2003 WL 21130167, at *3. And interfering with Consumers Energy's ability to perform its regulatory duties on Plaintiffs' properties affects not only Plaintiffs, but all customers downstream of Plaintiffs (or any other "similarly situated" party) who would be affected by a tree contacting a power line on Plaintiffs' properties.

12. The third factor likewise favors finding that primary jurisdiction lies with the MPSC because a decision here directly implicates the MPSC's well-established authority on ensuring reliable service in the state and could upset the widespread regulatory scheme. See *id.*

13. Plaintiffs try to plead around the primary jurisdiction doctrine by claiming that this case "is not about trimming cycles," but about "property rights and boundaries." Am. Compl. ¶ 4. True, this case is not about Consumers Energy's tree trimming "cycle" (i.e., tree trimming frequency). But it is—without dispute—about Consumers Energy's tree trimming practices. Plaintiffs want to stop Consumers Energy from using bark paint. See *id.* ¶¶ 37-41, 105(b), (d). And tree bark painting is a vital component—and, indeed, the first step toward—executing the MPSC-mandated plan to comply with vegetation management standards, make sure that crews trim the

right trees, and, in the end, improve reliability. Without blue bark paint, there would be no trees to trim in the first place.

14. Trying to circumvent application of the primary jurisdiction doctrine by characterizing the Amended Complaint as one about property rights alone overlooks that Plaintiffs are trying to dismantle a fundamental aspect of Consumers Energy's MPSC-mandated line clearance program. Whether Plaintiffs should be permitted to do so is a question that falls squarely within the MPSC's jurisdiction. See MCL 460.6(1); Mich Admin Code, R 460.3505.

15. Simply put, the MPSC is responsible for ensuring that Consumers Energy refrains from practices that threaten electric reliability. And the MPSC is responsible for reviewing and approving Consumers Energy's vegetation management plans—designed to improve reliability. The issues in this case clearly fall within the MPSC's specialized knowledge about its own regulatory requirements and Consumers Energy's plans.

16. Because Plaintiffs' Amended Complaint challenges the design and implementation of an MPSC-mandated line-clearing program, the doctrine of primary jurisdiction requires dismissal without prejudice (or a stay) pending resolution of the issues by the MPSC.

17. Indeed, multiple Michigan courts have already decided that the MPSC has primary jurisdiction over similar vegetation management disputes with public utilities. See *Evans*, 2003 WL 21130167; *Baker*, 2004 WL 2009260.

18. This Court should do so as well and grant summary disposition to Consumers Energy and dismiss this case without prejudice pending review and resolution by the MPSC.

WHEREFORE, for these reasons and those set forth in more detail in the accompanying brief, Consumers Energy respectfully requests that the Court enter summary disposition in its

favor, dismiss Plaintiffs' Amended Complaint without prejudice, and grant any other relief deemed appropriate.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

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Dated: December 19, 2025

STATE OF MICHIGAN

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BRIEF IN SUPPORT OF DEFENDANT CONSUMERS ENERGY COMPANY'S MOTION FOR SUMMARY DISPOSITION OF PLAINTIFFS' AMENDED COMPLAINT

INTRODUCTION

"Tree contact with electric lines remains one of the top causes of power outages in Michigan." Ex. 1, 9-5-25 MPSC Fact Sheet at 4. In fact, the 2003 blackout that affected an area with an estimated 50 million people was caused, in part, by poor vegetation management. That is why the Michigan Public Service Commission (the "MPSC")—pursuant to its statutory authority to oversee all matters pertaining to the operation of public utilities—requires heavily regulated public utilities like Consumers Energy to submit line clearance plans that address tree trimming. And that is why the MPSC has issued multiple orders over the last decade mandating that Consumers Energy be more aggressive in tackling tree trimming.

But Plaintiffs don't want Consumers Energy to do that. Plaintiffs don't like that certain trees on their properties were identified for trimming with the blue bark paint used by all public utilities in Michigan. So, Plaintiffs sued Consumers Energy in a campaign to curb Consumers Energy's vegetation management practices—not only on their own behalf, but on behalf of all others "similarly situated." Plaintiffs, however, ignore that overseeing a utility's vegetation management practices is a matter best left to the MPSC, not the courts. And Plaintiffs disregard that a ruling in this case could disrupt the regulatory scheme as a whole, deprive the MPSC of its statutory authority on this matter, lead to inconsistent results throughout the state, and negatively impact reliability for tens of thousands of Consumers Energy's customers.

Since this case asks whether a utility may operationalize an MPSC-mandated vegetation plan by using blue bark paint to mark trees in connection with a systematic clearance cycle, it necessarily implicates technical reliability standards, program metrics, and the MPSC's statewide oversight expectations. That is why Michigan courts have repeatedly recognized that the MPSC has primary jurisdiction over challenges to a public utility's operations, including tree marking,

trimming, and removal. This Court should do so as well, grant summary disposition to Consumers Energy, and dismiss the case without prejudice.

STATEMENT OF FACTS

I. The MPSC adopts a broad regulatory scheme to oversee utility vegetation management practices to improve reliability and decrease outages.

"[L]ine clearing or tree trimming is important" to the MPSC and a vital aspect of its "broad effort to improve the reliability of the state's power grid and to make it more resilient against the increasingly frequent and severe storms." Ex. 1, 9-5-25 MPSC Fact Sheet at 1-2. To that end, the MPSC requires utilities to "adopt and implement a program of maintaining adequate line clearance through the use of industry-recognized guidelines" that, among other things, "[i]ncludes tree trimming" and "[e]nsure[s] safety and reliability." Mich Admin Code, R 460.3505.

Consumers Energy adopted a line clearing program pursuant to that mandate, described in relevant part below:

> Forestry Planners ***mark trees*** for trimming and for removal on the circuits selected for treatment, ***classifying them*** for removal or for maintenance trimming, based on species, health, size, and condition. Property owners received notice prior to [low voltage circuit] trimming . . . with instructions for contacting Consumers, if desired. A Forestry Planner verifies the Company's access rights to trim when a customer raises an objection to tree work. A planner meets with the customer, explains the reasons for trimming or removal, and explains customer rights and options. . . . The Company's line clearance standards define the vertical clearances required from the conductor to limbs by specific species of trees.

Ex. 2, Excerpt of 9-23-24 Liberty Consulting Group Audit at 45-46 (emphasis added). Trees that are identified for trimming are marked with a blue dot, trees identified for cutting are marked with a blue "x," and trees that are diseased, damaged, dead, or dying and that are outside of the right-of-way are marked with a blue "a." See Am. Compl. at Ex. A. The marking system is an operational component of the MPSC-required vegetation program, not an ad hoc practice.

Ensuring that utilities are appropriately engaging and investing in proper vegetation management remains a top priority for the MPSC. So, the MPSC has issued countless orders over the last decade directing Consumers Energy to take a more aggressive approach to vegetation management. See, e.g., Ex. 1, 9-5-25 MPSC Fact Sheet; Ex. 3, 5-2-14 MPSC Order at 24, Case No. 17542 (recognizing that "one major cause" of the extensive outages associated with winter storms in 2014 "was fallen trees or tree limbs laden with ice" and adopting recommendations "regarding an expansion of vegetation management pilot programs to address trees located outside of utility easements"); Ex. 4, 12-4-14 MPSC Order at 9, Case No. 17542 (ordering Consumers Energy to "develop a hazardous tree removal program in 2015, addressing trees that are outside of the right-of-way" that "shall be incorporated into [its] normal vegetation management program[] and shall be included in any future electric rate case application"); Ex. 5, 12-17-20 MPSC Order at 338, Case No. U-20697 ("Consumers Energy Company shall file an annual report . . . and meet periodically with the Commission Staff throughout the year[] to evaluate the company's progress toward its line-clearing goals, to refine program metrics, and to discuss future strategies."); Ex. 6, 3-21-25 MPSC Order at 292-93, Case No. U-21585 (approving proposed O&M expense for line clearing, finding that "greater investment in tree trimming will result in reduced outages" and cost savings for customers, and directing Consumers Energy to consider shifting to a four-year fixed tree trimming cycle).

II. Plaintiffs file a purported class action lawsuit against Consumers Energy over Consumers Energy's MPSC-mandated vegetation management practices.

Plaintiffs own real property in different townships within Saginaw County and accuse Consumers Energy and its contractor of entering their property without their consent and "affix[ing] blue 'bark paint' on decorative and ornamental trees," including the one that Plaintiffs refer to as the "Mighty Maple." Am. Compl. ¶¶ 5-9, 37.

Although Plaintiffs don't claim that any trees on their properties were trimmed or cut, they urge that "pushing a blanket 30-foot clearance ignores that many trees" like the "Mighty Maple" are "already safely out of reach." *Id.* ¶ 22. That is because, according to Plaintiffs, any easements "are limited to what is 'reasonably necessary,' to maintain the safety and operability of the lines," and don't authorize Consumers Energy to mark trees with blue paint.[1] *Id.* ¶¶ 29, 32. Plaintiffs go on to claim that Consumers Energy "may not impose a county-wide vegetative clearance regime divorced from the actual location and reach of the conductors, nor may it assert a de facto expansion of a claim of easement width by fiat that does not exist." *Id.* ¶ 35. Plaintiffs—on behalf of themselves and purportedly others "similarly situated"—have brought claims for trespass, "wrongful interference with property rights," and statutory trespass to trees under MCL 600.2919. *Id.* ¶¶ 52, 66-103.

LEGAL STANDARD[2]

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint on the pleadings alone and should be granted "when the opposing party fails to state a claim upon which relief can be granted." *Franklin v McLaren Flint*, -- NW3d --, 2024 WL 3543483, at *3 (Mich Ct App, July 25, 2024). The court must accept all facts as true as alleged in the complaint. *Id.* When choosing to refer a matter to the relevant administrative agency on primary jurisdiction grounds, a court has discretion to retain jurisdiction or, if the parties will not be unfairly

[1] Though not relevant for purposes of this motion, Consumers Energy disputes, among other things, Plaintiffs' characterization of the scope of the easements at issue, which are far broader than Plaintiffs claim. By way of example, Consumers Energy refers the Court to a copy of the applicable easement for Plaintiff Scott Kuchar at Exhibit 7, which Plaintiffs neglected to attach to their Amended Complaint.

[2] A pleading raising the issue of primary jurisdiction under MCR 2.116(C)(4) is "inapt, not only because the doctrines are distinct, but also because invocation of primary jurisdiction is not the equivalent of summary disposition as the latter represents a final disposition of a claim while the former merely defers a claim to an administrative agency." *Travelers*, 465 Mich at 206.

disadvantaged, dismiss the case without prejudice. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 207; 631 NW2d 733 (2001).

The Court may properly take judicial notice of the orders and summaries thereof issued by the MPSC at Exhibits 1 through 6 and 8 since there is no dispute that the MPSC issued the orders, and Consumers Energy is using the orders not to prove their contents, but merely to demonstrate the breadth of the authority exercised by the MPSC over vegetation management.[3] See MRE 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Franklin*, 2024 WL 3543483, at *1 (taking judicial notice of issuance of executive orders by Governor Whitmer in connection with a motion under 2.116(C)(7) and (C)(8) and noting that the court "may take judicial notice of undisputed facts within public record"); *Dubrulle v DTE Energy Co*, No. 367095, 2025 WL 2426791, at *3 (Mich Ct App, August 21, 2025) ("It was not improper for the trial court to take judicial notice of the *existence* of the executive order when there can be no dispute that the order was issued.").[4]

[3] Consumers Energy acknowledges, however, that the Court of Appeals has disapproved of taking "judicial notice of hundreds of pages of publicly available documents when deciding a motion under MCR 2.116(C)(8)." *Krieger v Dep't of Env't, Great Lakes, & Energy*, 348 Mich App 156, 180; 17 NW3d 700 (2023). To the extent the Court disagrees that it has judicial notice here—and Consumers Energy doesn't believe that it should given the absence of any reasonable dispute that the orders were issued, see *Franklin*, *supra*, Consumers Energy alternatively moves for summary disposition under MCR 2.116(C)(10). See *Precise MRI of Michigan, LLC v State Auto Ins Co*, 340 Mich App 269, 274; 985 NW2d 892 (2022) (taking judicial notice in connection with a motion under 2.116(C)(10)).

[4] Under MCR 7.215(C)(1), Consumers Energy cites *Dubrelle* because it sets forth a helpful, analogous example where the Michigan Court of Appeals concluded that it was proper to take judicial notice of the existence of an executive order. Copies of all unpublished opinions are collectively attached hereto as Exhibit 9.

LAW AND ARGUMENT

I. The MPSC has primary jurisdiction over this dispute pursuant to its broad authority to regulate public utilities and their vegetation management practices.

The MPSC is "vested with the power and jurisdiction to regulate all rates . . . and all other matters pertaining to the formation, operation, or direction of public utilities" like Consumers Energy. MCL 460.6(1).

"The doctrine of primary jurisdiction recognizes this broad grant of authority," *Evans v Detroit Edison*, No. 239077, 2003 WL 21130167, at *2 (Mich Ct App, May 15, 2003), and comes into play whenever enforcement of a claim that is originally cognizable in the circuit courts "requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Travelers,* 465 Mich at 197 (emphasis deleted). "Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency." *Id.*

Although there is no fixed formula for determining whether an administrative agency has primary jurisdiction, a court should consider several factors: "(1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency." *City of Taylor v Detroit Edison Co,* 475 Mich 109, 122; 715 NW2d 28 (2006).

It is because of this broad regulatory framework that the MPSC has primary jurisdiction over disputes about a public utility's vegetation management. See *Evans*, 2003 WL 21130167, at *2-3. For example, in *Evans v Detroit Edison,* the Michigan Court of Appeals affirmed the trial court's decision that the MPSC had primary jurisdiction over plaintiff's purported class action

about the utility's implementation of "its catastrophic storm response procedures which provided that cut debris be left in the easement for removal by the property owner." *Id.* at *2. As the Michigan Court of Appeals explained:

> Whether defendant's catastrophic storm response policy was appropriately adopted as part of its mandated line clearance program is the decisive question presented by plaintiffs' case and is properly within the jurisdiction of the MPSC. . . . Here, all three criteria weigh in favor of deferral to the MPSC. First, defendant was allegedly acting under the MPSC's mandate that it implement a line clearance program when it developed and instituted its catastrophic storm response policy, implicating the MPSC's unique expertise on its regulatory scheme. Second, the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers, as well as on defendant's storm response efforts. Third, plaintiffs' case implicates the MPSC's regulatory responsibilities in that it presents an issue relating to defendant's "obligations to [its] customers as governed by the regulatory scheme." Therefore, we agree with the trial court that the MPSC was the proper forum to adjudicate plaintiffs' claim against defendant. Consequently, we also agree with the trial court's decision to stay further proceedings until the MPSC rendered its decision as to whether defendant's catastrophic storm response policy comported with its regulatory scheme. Accordingly, because plaintiffs failed to file their action with the MPSC, summary disposition was properly granted in defendant's favor.

Id. at *3 (quoting *Travelers*, 465 Mich at 198-99); see also *Baker v Detroit Edison Co*, No. 246401, 2004 WL 2009260 (Mich Ct App, September 9, 2004) (finding that the MPSC had primary jurisdiction over suit alleging that a fire was caused by the utility's failure to trim trees that were in close proximity to power lines).[5] The Court should reach the same result here.

A. Matters pertaining to tree marking, line clearing, and vegetation management fall within the MPSC's specialized knowledge.

The first factor—whether the matter falls within the agency's specialized knowledge—favors finding that primary jurisdiction lies with the MPSC. That is because "[t]he meaning and

[5] Under MCR 7.215(C)(1), Consumers Energy cites *Evans* and *Baker* because they set forth helpful, analogous examples where the Michigan Court of Appeals concluded that the MPSC had primary jurisdiction over cases challenging or otherwise implicating a utility's vegetation management practices.

application of rules governing maintenance of overhead power lines, and tree trimming around those lines, by a public utility are matters of specialized knowledge best considered first by the MPSC." *Baker*, 2004 WL 2009260, at *2.

Consumers Energy was acting under the MPSC's direction when it developed and implemented its line clearing program. See Mich Admin Code, R 460.3505 (requiring adoption of a line clearance program that addresses tree trimming and ensures reliability). And tree bark painting is an instrumental part of Consumers Energy's MPSC-mandated line clearance program to not only ensure compliance with vegetation management standards, but to prevent tree crews from cutting down or trimming trees that are not part of the plan. Therefore, as in *Evans*, any injury to Plaintiffs necessarily "implicat[es] the MPSC's unique expertise on its regulatory scheme." See *Evans*, 2003 WL 21130167, at *3; *Att'y Gen v Alternative Fuels, LC*, No. 264075, 2006 WL 287404, at *2 (Mich Ct App, February 7, 2006) ("[B]ecause plaintiffs' public nuisance tort claim is based on a dispute over the extent of defendant's responsibilities, which are anticipated by and contained in the scrap tire regulatory scheme, it is a matter incident to the regulation of defendant that falls within the primary jurisdiction of the MDEQ.").[6]

Plaintiffs try to plead around the primary jurisdiction doctrine by claiming that this case "is not about trimming cycles," but about "property rights and boundaries." Am. Compl. ¶ 4. True, this case is not about Consumers Energy's tree trimming "cycle" (i.e., tree trimming frequency). But it is—without dispute—about Consumers Energy's tree trimming practices. Plaintiffs want to stop Consumers Energy from using blue tree bark paint. See *id.* ¶ 105(d). And tree bark painting is a vital component—and, indeed, the first step toward—executing the MPSC-mandated plan to

[6] Under MCR 7.215(C)(1), Consumers Energy cites *Alternative Fuels* because it sets forth a helpful, analogous example where the Michigan Court of Appeals concluded that a Michigan regulatory agency had primary jurisdiction over a tort claim.

comply with vegetation management standards, make sure that crews trim the right trees, and, in the end, improve reliability. Without tree bark paint, there would be no trees to trim in the first place. Trying to circumvent application of the primary jurisdiction doctrine by characterizing the Amended Complaint as one about property rights alone overlooks that Plaintiffs are trying to dismantle a fundamental aspect of Consumers Energy's MPSC-mandated line clearance program. Whether Plaintiffs should be permitted to do so is a question that falls squarely within the MPSC's jurisdiction. See MCL 460.6(1); Mich Admin Code, R 460.3505; see also Ex. 3, 5-2-14 MPSC Order at 24 (adopting recommendations "regarding an expansion of vegetation management pilot programs to address trees located *outside of utility easements*" (emphasis added)).[7]

B. A decision in this case would interfere with the MPSC's uniform resolution of vegetation management issues for Consumers Energy and other Michigan utilities.

The second factor—whether a decision here would interfere with the uniform resolution of similar issues—also favors finding that primary jurisdiction lies with the MPSC. As in *Evans*, "the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers . . . ." See *Evans*, 2003 WL 21130167, at *3. "Tree contact with electric lines remains one of the top causes of power outages in Michigan." Ex. 1, 9-5-25 MPSC Fact Sheet at 4. Adequate vegetation management is therefore vital to providing reliable service throughout the

[7] Class actions require commonality, MCR 3.501(A)(1)(b), and the only thing common about each individual Plaintiff's claims is Consumers Energy's vegetation management practices, including commencing those practices by marking trees with blue bark paint. So, if this case is truly just about Plaintiffs' property rights as they claim—each of which is based on the scope of the individual easements pertaining to their respective properties—then Plaintiffs lack the commonality needed to bring a class action under Michigan law and should not have sought class action treatment. See, e.g., *Young v Thendara, Inc*, 328 Mich 42, 48; 43 NW2d 58 (1950) ("The diversity of sources from which titles to lots have been acquired by all other possible lot owners, the doubt as to the title of their grantors at the time their respective rights accrued, shows the impracticability of considering all owners of lots in the subdivision as a class for the purpose of decreeing their individual rights, in the case at bar.").

state. And the first integral step toward executing that vegetation management plan is marking the trees identified for trimming with bark paint. Interfering with Consumers Energy's ability to perform its regulatory duties on Plaintiffs' properties not only affects Plaintiffs, but all customers downstream of Plaintiffs (or any other "similarly situated" party) who would be affected by a tree contacting a power line on Plaintiffs' properties. Whether to do that here is a question best left to the MPSC. See *City of Taylor*, 475 Mich at 123 ("Because the expense incurred in complying with plaintiff's demands may potentially affect a wide range of ratepayers, most of whom do not reside in the City of Taylor, this is an area of law where uniformity is critical."); *Alternative Fuels*, 2006 WL 287404, at *3 ("[D]eferral to the MDEQ would promote uniformity and consistency in application of the scrap tire regulatory scheme . . . .").

C. A decision in this case would upset the MPSC's complex regulatory scheme on line clearing and vegetation management.

The third factor likewise favors finding that primary jurisdiction lies with the MPSC since a decision here directly implicates the MPSC's well-established authority on ensuring reliable service in the state and could upset the widespread regulatory scheme. See *Evans*, 2003 WL 21130167, at *3. "Public utilities are allowed to recover the costs associated with tree trimming activities and general maintenance of their distribution facilities through the rate case process," and the MPSC "reviews the utility's request for operations and maintenance expenses and capital spending to determine whether spending is adequate to maintain and improve reliability to customers." Ex. 8, 1-18-14 MPSC Order at 1-2. The MPSC's commitment to improving electric reliability through appropriate vegetation management is apparent from the multitude of orders it has issued over the last decade directing Consumers Energy to be *more aggressive* in its line clearing practices. See, e.g., Exs. 1-6, 8.

A ruling in this case will impact not only Consumers Energy's ability to carry out its MPSC-mandated and approved line clearing program, but those of the many other utilities who also use bark paint to mark trees for trimming or removal. Given the MPSC's broad authority to regulate public utilities and the extensive rules and orders on vegetation management that the MPSC has promulgated pursuant to its authority, there's no question that a ruling in this case could affect the MPSC's ability to carry out its regulatory responsibilities. See *City of Taylor*, 475 Mich at 123; *Alternative Fuels*, 2006 WL 287404, at *3 ("Because of the number and varying nature of scrap tire facilities across the state, the resolution of disputes in circuit court could hinder the MDEQ's responsibilities for administering the scrap tire act as set out by the Legislature."). This alone dictates a ruling that the MPSC has primary jurisdiction over this matter.

CONCLUSION

Multiple Michigan courts have already decided that the MPSC has primary jurisdiction over similar vegetation management disputes with public utilities. See *Evans*, *supra*; *Baker*, *supra*. Consumers Energy is a public utility that is heavily regulated by the MPSC. The MPSC is responsible for ensuring that Consumers Energy refrains from practices that threaten electric reliability. And the MPSC is responsible for reviewing and approving Consumers Energy's vegetation management plans—designed to improve reliability. The issues in this case clearly fall within the MPSC's specialized knowledge about its own regulatory requirements and Consumers Energy's plans. A ruling in this case could certainly interfere with the uniform resolution of similar issues, disrupt that regulatory regime, and pose a serious and significant threat to electric reliability and safety. As courts have previously decided, all factors necessary to invoke the doctrine of primary jurisdiction are easily satisfied here. Because the MPSC has primary jurisdiction over this

dispute, the Court should grant summary disposition to Consumers Energy and dismiss this case without prejudice pending review and resolution by the MPSC.

WHEREFORE, Consumers Energy respectfully requests that this Honorable Court enter summary disposition in its favor, dismiss Plaintiffs' Amended Complaint without prejudice, and grant any other relief deemed appropriate.

Respectfully submitted,

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Dated: December 19, 2025

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 19, 2025, a copy of the foregoing document and this **Proof of Service** were caused to be served upon the attorneys of record by:

(x) First-Class Mail

( ) E-File/E-Serve

(x) Email: pellison@olcplc.com; matt@matthewgronda.com; Anthony.Sallah@btlaw.com; Emily.Burger@btlaw.com

( ) FedEx

( ) Hand Delivery

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

/s/Amy M. Johnston
Amy M. Johnston (P51272)

45230857.3/018544.00208

EXHIBIT 1

FACT SHEET

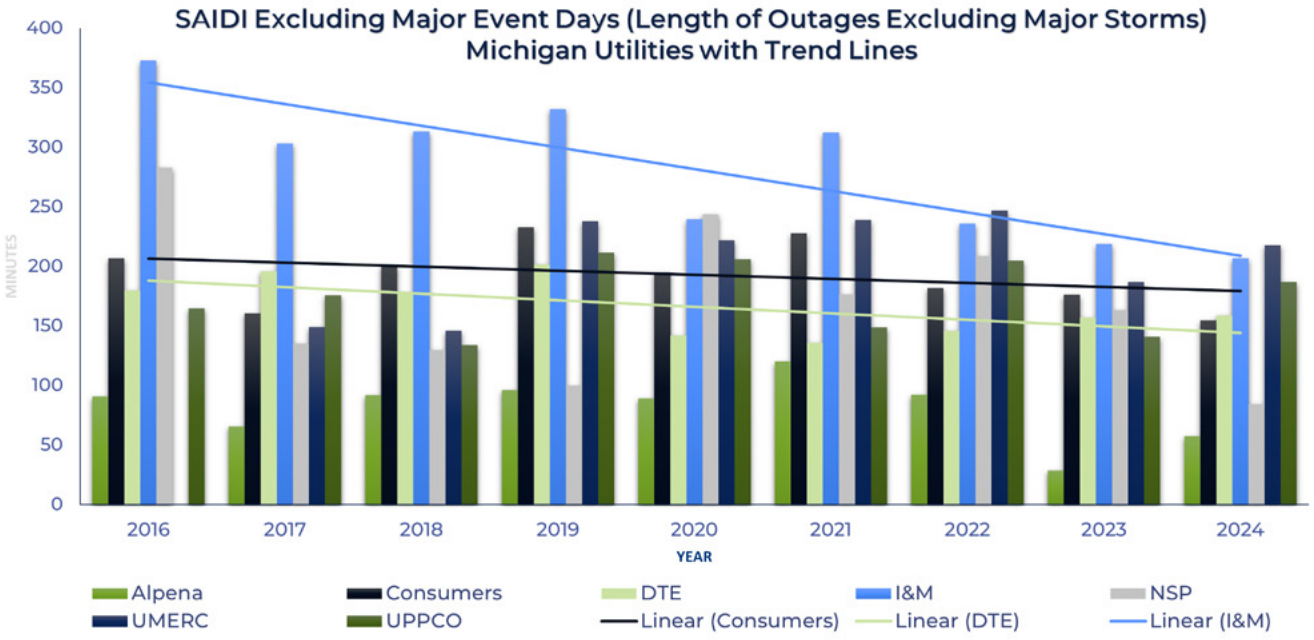
September 5, 2025

MPSC's Focus on Reliability and Resilience

DISCLAIMER: This document was prepared to aid the public's understanding of certain matters before the Commission and is not intended to modify, supplement, or be a substitute for the Commission's orders. The Commission's orders are the official action of the Commission.

The Commission is in the midst of a broad effort to improve the reliability of the state's power grid and to make it more resilient against the increasingly frequent and severe storms. While there is still work to do, the Commission's efforts are leading to measurable improvements.

Michigan's Average Length of Outages is Trending in the Right Direction



Source: Data through 2024 publicly available on MPSC's Distribution System Reliability Metrics webpage for regulated utilities.

The length of power outages (excluding major event days that could occur due to major storms) of the utilities regulated by the Commission as shown above has decreased by a combined average of 26 minutes since 2019. Michigan customers expect their electric service to be restored quickly and additional improvements are needed, however, the trend lines are headed in the right direction.

The Commission's Work to Improve Distribution Reliability

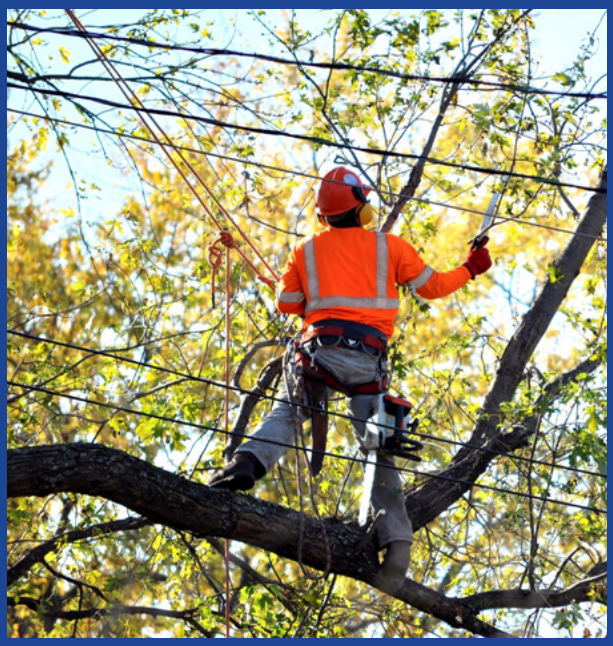
2017: The Commission launched an initiative focused on transparent and long-term electric distribution planning and directed DTE Electric, Consumers Energy and Indiana Michigan Power Company to file distribution plans focused on initiatives aimed at reducing power outages and improving safety.

2018: DTE Electric and Consumers Energy filed the first iteration of their respective electric distribution plans as directed by the Commission.

2018: The Commission provided additional guidance on filing future electric distribution plans and emphasized the Commission's standing objectives for distribution planning: safety, reliability, resiliency, cost-effectiveness and affordability, and accessibility.

2019: Indiana Michigan Power Company filed the first iteration of its electric distribution plan as directed by the Commission.

Line clearing, or tree trimming, is important because falling tree limbs are the leading cause of power outages in Michigan.



- **In 2019, the Commission authorized an enhanced tree trimming program, or surge, for DTE Electric and requires an annual report on DTE's trees trimmed. DTE has trimmed an average of 51% more miles annually from 2019 - 2024 compared to pre-2019.**
- **In 2020, the Commission authorized increases in Consumers Energy's vegetation management, or line clearing, program and requires an annual report on Consumers Energy's trees trimmed. Consumers Energy has trimmed an average of 50% more miles annually from 2020 – 2024 compared to pre-2020.**

2021: Following severe storms, the Commission initiated an investigation of the utilities' storm response in Case No. U-21122 and held a two-part technical conference on Emergency Preparedness, Distribution Reliability, and Storm Response. The Commission held that "ratepayers have a right to expect the utilities to anticipate extreme weather events, to provide a hardened grid that can withstand extreme weather, and to be prepared to restore power expediently when the grid fails."

2021: DTE Electric, Consumers Energy, and Indiana Michigan Power Company filed the second iteration of their respective long-term electric distribution plans.

2022: The Commission ordered a first-of-its-kind, comprehensive. independent third-party audit of DTE Electric's and Consumers Energy's electric distribution systems to map out a path forward in the wake of persistent reliability and safety challenges.

2022: To increase transparency, the Commission directed the collection of additional data from Michigan utilities related to electricity outages and power restoration. The new reliability reporting requirements mandate that all utilities provide monthly reliability data broken down by circuit beginning with January 2023, as well as broken down by zip code and census tract. This data is publicly available upon request.

2023: The Commission held three town hall meetings to hear directly from utility customers experiencing prolonged outages during severe winter storms.

2023: Consumers Energy, DTE Electric, and Indiana Michigan Power filed revised iterations of their respective distribution plans as directed by the Commission.

2023: The Commission launched new Distribution System Reliability webpages which provide more detailed reliability data and outage information for customers than has been publicly available previously.

2023: The Commission hosted a 4.8 kilovolt (kV) technical conference in March exploring issues involving the 4.8 kV electric system in the Detroit area, including the Detroit Public Lighting Department's arc wire system, and opportunities, benefits, challenges, and alternatives to the 4.8 kV hardening program.

2023: The Commission approved updated Service Quality and Reliability Standards and increased the outage accommodation credit provided to customers experiencing lengthy or frequent outages from $25 to $35 and made the credit automatic so that qualified customers would not have to ask the utility for it. The Commission approved another increase to $38 later in the year.

2023: The Commission hosted a two-day resilience technical conference examining the interconnectedness of resilience and critical infrastructure, communications with customers, resilience challenges and opportunities, the unique challenges faced by vulnerable customers, and enhanced coordination between utilities and local governments.

2023: The Commission approved a 2-year investment recovery mechanism (IRM) that is designed to help track investments in DTE Electric's distribution system and ensure continued investment in the distribution grid to improve reliability and resilience. The Commission authorized dedicated improvements for circuit conversion, sub-transmission redesign and rebuild, breaker replacement, and 4.8 kV circuit automation. The IRM ensures that DTE will spend the dollars approved only for reliability investments, and if not are refunded to customers. The Commission approved a 1-year extension of DTE Electric's IRM in 2025.

2023: The Commission directed the Staff to convene a Financial Incentives and Disincentives workgroup to develop metrics for electricity distribution performance and requested comments on initial proposed distribution performance metrics aimed at improving the reliability of Michigan's electric grid.

2024: The Commission continued to focus on tree trimming as evidenced by approvals in utility rate cases, as well as accounting measures approved in Case No. U-21128 and Case No. U-21799. Tree contact with electric lines remains one of the top causes of power outages in Michigan.

2024: The Commission approved a 2-year investment recovery mechanism (IRM) that is designed to help track investments in Consumers Energy's electric distribution system and ensure continued investment in the distribution grid to improve reliability and resilience. The Commission authorized dedicated improvements for low-voltage distribution line improvements, resilience improvements aimed at shortening the outage duration during major storms, and system protection. The IRM ensures that Consumers Energy will spend the dollars approved only for reliability investments, and if not are refunded to customers. The Commission approved an expansion for Consumers Energy's IRM in 2025.

2024: The Commission held engagement sessions throughout 2024 to inform refinements to proposed financial incentives and disincentives aimed at reducing electricity outages and improving restoration times.

2024: The Commission presented new distribution system reliability web pages in a public Commission meeting adding additional transparency to utility reliability performance.

2024: The Commission increased the amount of the bill credit that customers who endure lengthy or frequent power outages automatically receive to $40 as an accommodation for those who lose electric service while incentivizing utilities to improve reliability and shorten the length of outages.

2024: Alpena Power Company and Northern States Power Company filed their first distribution plans as directed by the Commission.

At the close of 2024, Consumers Energy and DTE Electric announced improvements in electric system reliability and resilience:

- Consumers Energy announced that the average customer experienced 21 fewer power outage minutes in 2024 compared to 2023 and over 93% of customers experiencing power outages had their power restored in less than 24 hours in 2024, up from 87% in 2023.
- DTE Electric announced that its customers experienced nearly 70% improvement in time spent without power in 2024 compared to 2023, due in part to grid improvements and in part to less extreme weather.

2025: The Commission directed Consumers Energy and DTE Electric to file applications to implement a financial incentive/disincentive mechanism addressing seven metrics focused on outage restoration time during varying types of weather conditions and the frequency of power outages. The Commission directed that data collection to establish baselines for the metrics should begin in 2026 with implementation of the financial incentive/disincentive mechanism to begin in 2027.

2025: The Commission held a townhall meeting in northern Michigan to hear directly from community members and utility customers experiencing prolonged outages during severe winter storms.

2025: The Commission ordered electricity distribution reliability improvements of Consumers Energy and DTE Electric as a result of the independent third-party audit of their distribution systems. The results of the audit will continue to inform the Commission's work to reduce power outages, shorten the time for restoration of power after storms, and keep residents safe as work to implement the reliability improvements will continue in future electric rate cases and electric distribution plan filings.

2025: The amount of the bill credit that customers who endure lengthy or frequent power outages automatically receive is slated to increase again on October 1, 2025, as an accommodation for those who lose electric service while incentivizing utilities to improve reliability and shorten the length of outages.

The Commission remains focused on making continued improvements to electric reliability and resilience for utility customers in Michigan.

Individuals with disabilities may contact the Commission's Executive Secretary at (517) 284-8090 to request an alternative format to these materials.

EXHIBIT 2

Final Report
Utility Distribution Audit of
Consumers Energy

Part Two

Presented to the:

Michigan Public Service Commission

Presented by:

The Liberty Consulting Group

September 23, 2024

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The data show a linear progression of outage numbers as clearing durations extend for 24.9kV circuits, which receive the most frequent treatment. However, the reliability of the data for the two lower (12.47 and 8.32kV) voltages appears questionable given clear, and under the circumstances, dramatic drops in outages as last treatment dates extend into extreme ranges.

For what it is worth, the data does show in all cases that four-year cycles produce materially lower numbers for all three voltage classes than do longer ones. Absent clear evidence to support the counterintuitive notion that outage levels actually decline for 12.47 and 8.32kV circuits, but not for 24.9kV circuits, the data do not present a case for materially different and longer cycles for lower voltage circuits.

c. LVD Forestry

The total length of the LVD system, its many long circuits, and the comparatively dense vegetation across large portions of the service areas all contribute to tree related outage frequency and duration. The historical and continuing application of anomalously long trimming cycles compound the effects. The next table summarizes LVD primary circuit miles trimmed through 2023 and planned for 2024 through 2027.

LVD Circuit Mileage Trimmed

Year	Miles
2021	5,279
2022	6,388
2023	6,365
2024	6,760
2025	7,232
2026	7,449
2027	7,672

Planning and execution of the Company's LVD Full Circuit Clearing Program operates on the basis of primary circuit miles, not on the number of circuits trimmed. In 2022 Consumers developed an in-house forestry analytics program to optimize the yearly LVD full circuit clearing workplan. This Forestry Workplan Intelligence & Strategy Engine ("WISE") tool incorporates the calculated highest reliability and safety benefits achievable for each annual clearing budget. Consumers uses it to identify the greatest trimming reliability benefit for a set budget dollar amount. Forestry WISE calculates a risk score based on weather, voltage, years since last cleared, pole age, delta circuits, and outage history to predict theoretically avoided outages for a given work plan. Management uses risk scores to maximize budget effectiveness. Forestry WISE also supports prioritization of annual program schedules, identifying for earliest trimming the areas that caused the most reliability issues.

Forestry Planners mark trees for trim and for removal on the circuits selected for treatment, classifying them for removal or for maintenance trimming, based on species, health, size, and condition. Property owners receive notice prior to LVD circuit trimming by postcard and letters, with instructions for contacting Consumers, if desired. A Forestry Planner verifies the Company's access rights to trim when a customer raises an objection to tree work. A planner meets with the customer, explains the reasons for trimming or removal, and explains customer rights and options.

Planners contact customers affected by HVD vegetation work in person or by letter. Forestry works each mainline circuit by sections outward from the substation, including lateral circuits, and using six to ten crews at a time per circuit.

The Company's line clearance standards define the vertical clearances required from the conductor to limbs by specific species of trees. The minimum vertical clearing for voltages operating between 750 and 14.4kV is 10 feet. The standards set the minimum vertical clearance at 20 feet for fast-growing species (*e.g.*, silver maple, poplar, willow) to accommodate inter-trimming growth. The standards permit for LVD circuits overhanging limbs that have a minimum clearance above the conductors of 10 feet. This same standard applies for each of the 13 LVD voltages that Consumers currently supplies in various areas of the distribution system. These different voltages may be trimmed at different clearing cycles.

Service wire and secondary conductors operating at less than 750 volts are trimmed to provide two feet of clearance around conductors. Service trimming occurs after notifying the customer. Aerial spacer cable installed in areas of high-density trees requires a minimum clearance of six feet. Larger limbs may remain without trimming if no future trimming is expected to be required in order maintain at least three feet of clearance to conductors. The line clearing specification also requires all vines growing on poles, guy wires and conductors to be cut sufficiently to produce a twenty four inch gap between the aerial portion of the vine and the rooted portion of the vine, with vine stumps treated with herbicide.

The Company has been removing hazard trees, when the customer does not object. These trees consist of those dead, dying, or mechanically stressed trees outside of the right-of-way but within 20 feet of right-of-way edge. The next table summarizes removals by year (with 2023 data through September).

LVD Hazard Tree Removal

Year	Removed
2019	17,881
2020	16,551
2021	20,291
2022	20,292
2023	15,464

d. HVD Forestry

The low numbers of HVD tree-caused CMIs likely results from the loop configuration common to the Company's HVD circuits. HVD assets also benefit from a combination of their shorter, 4.2-year trim cycle, greater clearance distances between trees and conductors, removal of overhead limbs, a wide hazard tree zone, and removal of off right of way-hazard trees. Nevertheless, fallen off-right-of-way trees still comprise a major cause of those relatively few HVD tree outages that do occur.

HVD corridors must accommodate 1,100 overhead circuits, about 4,650 circuit miles, and 1,721 line segments. Management clears these corridors to a width of 80 feet, with 40 additional feet cleared of hazard trees. The 4.2-year HVD clearing cycle leaves no tree limbs overhanging

EXHIBIT 3

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to investigate the responses of **CONSUMERS ENERGY COMPANY** and **DTE ELECTRIC COMPANY** to recent storm damage in their service territories.	))))))	Case No. U-17542

At the May 2, 2014 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

ORDER

On December 21 and 22, 2013, a severe ice storm crossed the midsection of Michigan's Lower Peninsula. As a result, an estimated 600,000 customers of Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) lost electric power to their homes and businesses for varying lengths of time. Published reports indicate that some customers remained without power for over eight days. In addition to the extended outages and an unprecedented number of downed lines, it was reported that some customers found it difficult to report outages.

On January 8, 2014, the Commission, on its own motion, ordered an investigation into both utilities' responses to the recent electric outages (January 8th order). The Commission identified six criteria to be considered in the investigation: (1) how the ice storm affected the utilities' distribution systems; (2) how the utilities responded before and during the storm (including

adopt an annual or bi-annual certification program to ensure that more trained workers are available before an outage event begins. The Staff notes that, although both utilities reported no injuries from electrical contact during the ice storm, this does not relieve a utility of their obligation to address public safety. The Staff does conclude that the utilities adequately addressed the Commission's public safety concerns. The Staff finds that there is room for improvement in terms of responding to and securing downed wires in a more timely fashion. The Staff believes that restoration and improvements would be realized if the utilities would deploy greater numbers of personnel to attend to wire downs earlier in the weather event.

Conclusion

The Commission generally finds the Staff's and the utilities' proposed recommendations to be appropriate and looks forward to monitoring and working with the utilities in the future to improve their performance in those areas identified where improvements are necessary.

Although the Commission commends each utility for its speedy reliance on mutual aid to bolster the restoration efforts employed, it likewise agrees with the Staff's assessment that Consumers should have called in even more in-state labor and mutual aid before the storm hit to prepare for the outages to come. In a related matter, the Commission urges the utilities and the AFL-CIO to jointly consider the union's recommendation for an independent audit regarding the adequacy of current baseline staffing levels. The Commission believes that this discussion should start with the traditional collective bargaining process because the utilities and the unions are well positioned and experienced in addressing the issue of staffing levels. The Commission is persuaded that before using this case as a vehicle for interceding into an area that is normally considered a matter for collective bargaining, it should allow the utilities and the unions to study whether current staffing levels are appropriate.

The Commission finds that the utilities' planned distribution investments to replace both low voltage and high voltage distribution system equipment are a step in the right direction to reduce the potential for future power outages of this magnitude. The Commission also supports each utility's continued deployment of its AMI and smart meters. The Commission likewise agrees with the utilities' plans to continue relying on and improving their system automation schemes, including, but not limited to SCADA and DSCADA projects. The Commission agrees with each utility's plan to implement 2012 design standards from the National Electric Safety Code. The Commission also encourages each utility to continue with vegetation management improvements, and other planned distribution investments identified in their respective filed reports. The Commission agrees with the Staff's recommendation that the companies attempt to accelerate investments on projects that minimize outage frequency and duration, such as distribution automation. These investments, combined with improved vegetation management and other operational practices, are essential to reduce not only the frequency of outages, but also to limit the duration of outages.

The Commission recognizes that one major cause of the outages that occurred was fallen trees or tree limbs laden with ice that affected the distribution system. For this reason, the Commission agrees with and adopts the recommendations the Staff proposed in its report regarding an expansion of vegetation management pilot programs to address trees located outside of utility easements. The Commission likewise agrees with and adopts the Staff's recommendation that both companies should spend at least the dollars approved for vegetation management programs through the rate case process. The Commission approves of the Staff's proposal to work with both utilities and local governments to put in place local ordinances or legislation addressing the hazardous tree removal process and encourages the adoption of future laws, tariffs, or riders that

permit utilities to address undergrounding and tree trimming outside of planned maintenance schedules. Finally, the Commission encourages increased communication with customers about the dangers of hazardous trees and the importance of tree removal.

Regarding the utilities' response to customer calls reporting outages, the Commission finds that while the utilities achieved conformance with the service quality and reliability standards for answer time and call blockage rate for 2013 overall, the answer times and call blockage rates fell significantly short of meeting the standards for at least some duration during the storm. The Commission agrees with the Staff that Consumers should report its improvements in their telecom capacity to handle increased call volumes like those experienced during this storm. Specifically, the Commission requests that the utility identify those issues within their telecommunication system that led to a 60% call blockage factor, and identify its efforts to work with its telecom carrier to avoid such a high call blockage factor in the future. Toward that end, Consumers shall file a report with the Commission by August 15, 2014, providing the information requested and its ongoing progress improvements in this area.

Regarding the service quality customer billing credit of $25.00, the Commission directs the Staff to investigate the feasibility of making the outage credit automatic and include any recommendations regarding the outage credit in a report to the Commission on October 1, 2014. [1] In addition, the Commission recommends that the Staff work collaboratively with both utilities and other interested persons to define performance incentives and underperformance penalties that

[1]The Commission is aware that the $25.00 credit provision is set forth in its Electric Distribution Service Standards, R 460.701 *et seq*., and that at least some of the Staff's proposals may require commencement of a rulemaking proceeding. If, after studying the issues, the Staff concludes that changing these administrative rules is advisable, then the Staff shall include specific proposed language revisions to those rules in its October 1, 2014 report.

are triggered by the number and duration of interruptions to residential customer service both during a single year and for consecutive year outages.

The Commission declines to address Consumers' request for a catastrophic storm response mechanism in this case but would address such a request if raised in a rate case filing.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company and DTE Electric Company shall work collaboratively with the Commission Staff and other interested persons to implement the recommendations discussed in this order.

B. Consumers Energy Company shall file a report in this docket by August 15, 2014, indicating its improvements in handling increased call volumes like those experienced in the December 2013 ice storm.

C. The Commission Staff shall file a report in this docket no later than October 1, 2014, outlining the process improvements made to date and proposed improvements going forward.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

John D. Quackenbush, Chairman

Greg R. White, Commissioner

By its action of May 2, 2014.

Mary Jo Kunkle, Executive Secretary

Sally A. Talberg, Commissioner

EXHIBIT 4

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to investigate the responses of **CONSUMERS ENERGY COMPANY** and **DTE ELECTRIC COMPANY** to recent storm damage in their service territories.	))))))	Case No. U-17542

At the December 4, 2014 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

ORDER

On December 21 and 22, 2013, a severe ice storm crossed the midsection of Michigan's Lower Peninsula. As a result, an estimated 600,000 customers of Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) lost electric power to their homes and businesses for varying lengths of time. In addition to the extended outages and an unprecedented number of downed lines, some customers found it difficult to report outages.

On January 8, 2014, the Commission, on its own motion, ordered an investigation into both utilities' responses to the outages (January 8 order). The Commission identified six criteria to be considered in the investigation: (1) how the ice storm affected the utilities' distribution systems; (2) how the utilities responded before and during the storm (including information on the number and deployment of utility line crews, Michigan-based contractors, and mutual assistance crews

lines would have been required in order to prevent any blocked calls. Consumers indicates that it recently completed the addition of eight T1 lines, thus increasing its trunk capacity by 15%. Consumers also anticipates substantial hardware and software phone system updates in 2015. The Staff notes that it is satisfied with the utility's identification of the issues with its telecommunications system, with the increased phone system capacity, and with the other future improvements anticipated in 2015.

The Commission finds that Consumers has appropriately balanced the need for some additional telecommunications capacity, and the risk of another catastrophic storm in the near term, with the fact that the AMI system, and other smart grid components that the company is in the process of implementing, are expected to significantly reduce the need for customers to call in outages over time. This is not to say, however, that Consumers should not adequately monitor its telecommunications systems and ensure continuous sufficient telecommunications capacity.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company and DTE Electric Company shall carry out the increased reporting requirements adopted herein, and shall file the required information no later than April 2 of each year.

B. Consumers Energy Company and DTE Electric Company shall develop a hazardous tree removal program in 2015, addressing trees that are outside of the right-of-way. This program shall be incorporated into their normal vegetation management programs, and shall be included in any future electric rate case application.

C. Consumers Energy Company and DTE Electric Company shall display outage credit information on the front page of their websites after major storms, and shall provide an application

for the credit and an explanation of the filing process once a year to all customers in February of each year beginning in 2015.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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John D. Quackenbush, Chairman

_____

Greg R. White, Commissioner

_____

Sally A. Talberg, Commissioner

By its action of December 4, 2014.

_____

Mary Jo Kunkle, Executive Secretary

EXHIBIT 5

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the generation and distribution of electricity and for other relief.	)))))	Case No. U-20697

At the December 17, 2020 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Sally A. Talberg, Commissioner
Hon. Tremaine L. Phillips, Commissioner

ORDER

proceedings . . . ." *Id*., pp. 119-120. Consumers avers that, in this case, the Commission should find that new base rates should become effective for service rendered on January 1, 2021, which is consistent with its contract with HSC, as discussed previously.

The Commission has considered each of the Staff's proposals for rate effective dates and finds that, given the timing of the order in this case, there is no conflict between having the rates take effect on January 1, 2021, and the Staff's proposal to provide for a seven day window to allow for any errors to be corrected prior to rate implementation. Therefore, the Commission finds that the rates shall be effective January 1, 2021.

THEREFORE, IT IS ORDERED that:

A. Based on this order's findings adopting a January 1, 2021, through December 31, 2021, test year, a jurisdictional rate base of $11,660,441,000, an authorized rate of return on common equity of 9.90%, and an authorized overall rate of return of 5.67%, Consumers Energy Company is authorized to implement rates that increase its annual electric revenues by $90,220,000, on a jurisdictional basis, over the rates approved in the January 9, 2019 order in Case No. U-20134.

B. Consumers Energy Company is authorized to implement rates consistent with the revenue deficiency approved by this order on a service-rendered basis for service provided on and after January 1, 2021, as reflected in Attachment A (a summary of revenue by rate class), Attachment B (tariff sheets), and Attachment C (calculation of the capacity charge as updated by this order) to this order. Within 30 days of the date of this order, Consumers Energy Company shall file tariff sheets substantially similar to Attachment B. When filing the tariffs consistent with those ordered, Consumers Energy Company shall also update the Contribution In Aid of Construction Allowance Schedule amounts on Tariff Sheet C-4.00, Section C1.4, to be consistent with the rates approved in this order. Consumers Energy Company shall implement a state reliability mechanism capacity

charge of $136,857 per megawatt-year, or $374.95 per megawatt-day, for customers taking capacity service, as shown on Attachment C to this order. Attachment B contains the associated capacity rates.

C. In its next general rate case, Consumers Energy Company shall include in its information technology plan detail regarding the Customer Relationship Management and Advanced Analytics Hub programs including, but not limited to, a benefit/cost analysis for the programs; the information technology and software needed to optimize customer service and enrollment in programs such as energy waste reduction, demand response, and renewable energy; and quantification of the expected growth in effected programs as a result of the projects.

D. In future rate case filings, and consistent with this order, Consumers Energy Company shall, in describing projected capital expenditures, provide the following information: (1) future load forecasts shall be based on advanced metering infrastructure data and other data such as a hosting capacity analysis or interconnection process information; (2) load forecasts shall be aligned between the company's most recent five-year distribution investment and maintenance plan and the currently-approved integrated resource plan; and (3) rate base distribution capital spending shall, where possible, be aligned with the most recent five-year distribution investment and maintenance plan, and, where alignment is not possible, an explanation shall be included.

E. In its next integrated resource plan application, Consumers Energy Company shall include the cost of the Centralized Demand Response Assessment project and the costs assigned to the demand response resources the company supports, as described in this order.

F. Consumers Energy Company shall include demand response pilot program updates, consistent with this order, in the Demand Response Annual Report.

G. The Commission Staff shall convene a work group in 2021 to consider updates to policies addressing contributions in aid of construction. The Commission Staff shall provide notice to the parties in this docket; establish a conference schedule and a framework for participation; and, in collaboration with conference participants, a list of topics, issues, and objectives to be addressed and achieved. At the conclusion of the work group, the Commission Staff shall file a report in this docket, no later than January 15, 2022, detailing its findings and recommendations regarding any recommended changes to the Commission's contributions in aid of construction policies.

H. The Commission Staff shall convene a technical collaborative in 2021, with the participation of Consumers Energy Company, to evaluate improvements to Consumers Energy Company's municipal lighting program and to address issues including, but not limited to, light-emitting diode conversion and updates to municipal streetlighting technology and service in the last decade. The Commission Staff shall provide notice to the parties in this docket; establish a schedule and a framework for participation; and, in collaboration with participants, a list of topics, issues, and objectives to be addressed and achieved. At the conclusion of the work group, the Commission Staff shall file a report in this docket, no later than December 15, 2021, detailing its findings and recommendations.

I. The Commission Staff shall convene a low-income workgroup in 2021 with the participation of Consumers Energy Company. As described in this order, in this collaborative Consumers Energy Company shall provide a proposal for a percentage-of-income pilot program for its electric service customers.

J. Consumers Energy Company shall include a performance-based regulation proposal consistent with the direction in this order in its upcoming distribution investment and maintenance

plan to be filed no later than September 30, 2021, and shall share a draft of the plan with stakeholders and the Commission Staff by August 1, 2021.

K. In the first quarter of 2021, the Commission Staff shall initiate a Value of Solar work group, as described in this order.

L. In future rate case filings, Consumers Energy Company shall use appropriate line loss factors, as described in this order, for retail open access customers.

M. In future rate case filings, Consumers Energy Company shall provide inflation projections supported by appropriate documentation, as described in this order.

N. In future rate case filings, Consumers Energy Company shall provide corporate services projections supported by appropriate documentation, as described in this order.

O. Consumers Energy Company shall file an annual report in this docket no later than December 15, 2021, and meet periodically with the Commission Staff throughout the year, to evaluate the company's progress toward its line-clearing goals, to refine program metrics, and to discuss future strategies.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Sally A. Talberg, Commissioner

Tremaine L. Phillips, Commissioner

By its action of December 17, 2020.

Lisa Felice, Executive Secretary

EXHIBIT 6

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the generation and distribution of electricity and for other relief.	)))))	Case No. U-21585

At the March 21, 2025 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner
Hon. Alessandra R. Carreon, Commissioner

ORDER

particularity to the customer costs and restoration costs associated with tree-caused outages and not at average values acrost all outages." MNSC's replies to exceptions, p. 14 (quoting March 1 order, pp. 157-161). MNSC criticizes Consumers for filing its Optimization Analysis after this current case was filed such that the findings were not incorporated into the Company's Reliability Roadmap or its forestry line-clearing O&M approach or spending proposal. MNSC's replies to exceptions, p. 14. MNC asserts that the Optimization Analysis "unequivocally shows that more aggressive line clearing cycles would reduce outages with net cost savings for customers," as Mr. Denzler testified. *Id*., p. 15 (citing 3 Tr 254-314; 5 Tr 3017-3022). While MNSC posits that Consumers can do more in its line-clearing approach, it supports the company's Forestry O&M spending because "less spending promises worse outcomes." MNSC's replies to exceptions, p. 15.

MNSC supports two recommendations to improve reliability for Consumers' customers in a cost-effective way: (1) "Consumers should develop programmatic improvements to its line clearing program, starting with a strategy and plan to move faster towards shorter clearing cycles" and (2) Consumers should maintain its status for its 2023 levels of capital spending "because increases are premature ahead of a revised line clearing." *Id*. MNSC mentions Consumers' exceptions, while stating that it is "frustrated by the Company's dilatory and non-committal approach to implementing more aggressive line clearing cycles," again arguing that Consumers' seven-year cycle "is ineffective." *Id*., p. 16. MNSC asserts that Consumers needs to be ordered to present a clear plan for more aggressive line clearing and that such reporting be consistent with what DTE Electric includes in its own annual tree-trim reports. *Id*. (internal citations omitted). Lastly, MNSC asserts that the Commission "should disallow the proposed spending increases for

HVD and LVD Reliability programs discussed above because they are based upon cost-ineffective strategies – relative to cost-effective line clearing . . . ." MNSC's replies to exceptions, p. 16.

The Commission finds the ALJ's recommendations well-reasoned and supported by the record and agrees with the ALJ that Consumers' proposal of $125.086 million for its O&M line clearing expense is reasonable and prudent as it will allow Consumers to spend the full amount for line clearing to increase the resiliency of its electric distribution system. However, the Commission agrees with MNSC's argument that Consumers' own Optimization Analysis shows that greater investment in tree trimming will result in reduced outages, along with cost savings for customers. Indeed, under cross-examination, the company's witness Ms. Bolden agreed that "the analysis [underlying Consumers' Optimization Analysis] concluded that a four-year fixed cycle is the optimal cycle length to maximize customer benefits at the lowest possible cost to customers." 3 Tr 296. Further, the company's only purported justification for not embracing this "optimal cycle length" is that it would be inequitable for residential customers to pay a disproportionate amount for the additional costs of shifting to a four-year fixed cycle as the majority of benefits accrue to non-residential customers. Yet the Commission notes that this same reasoning also applies to the company's current efforts to move to a seven-year effective cycle, as noted by MNSC (*see*, 3 Tr 303-305), and it is unclear why the company would not move forward with at least considering a more aggressive, more optimal tree trim cycle. As such, the Commission expects Consumers to incorporate the results of the analysis underlying its own Optimization Analyses and directs the company to consider the benefits of shifting to a four-year fixed tree trimming cycle in its next electric rate case. At a time when the company is proposing a 44% increase in capital spending in this case to improve reliability, it seems incongruous to keep LVD O&M essentially flat through 2028 even while acknowledging that a four-year fixed tree trimming

cycle is optimal. The Commission notes that this directive to consider the benefits of shifting to a four-year tree trim cycle is also consistent with the ALJ's recommendation that Consumers provide an analysis of the feasibility of more aggressive line clearing in its next electric rate case.

3. Service Restoration Operations and Maintenance Expense

a. Service Restoration Expense

Consumers is projecting service restoration O&M expenses of $133.5 million for the projected test year. Exhibit A-106. Consumers' witness, Mr. Andrew Snider, testified on service restoration costs, stating that those costs have been increasing "in large part by catastrophic storms." 5 Tr 2521. Mr. Snider testified that in 2023, more than $109 million in O&M spending was due to catastrophic storms, with "[f]our of the top 15 worst storm events (in terms of customer impact) of the past 25 years hav[ing] occurred just since 2020 . . . ." 5 Tr 2522-2523. As "Michigan is experiencing more volatile and several weather patterns due to climate change[,]" Consumers expects service restoration costs to increase. 5 Tr 2524. To mitigate such costs, Mr. Snider testified, Consumers has a dedicated team to study and improve restoration efficiencies and has "been able to reduce [its] utilization of mutual assistance and broker crews by 25% and plan[s] to achieve another 25% reduction over the next two years." 5 Tr 2524. Consumers has also entered into a storm on-call agreement with its own internal union workforce as its studies have shown that its "own internal crews complete more than twice as many orders per shift and have a 33% cost advantage compared to contract crews." 5 Tr 2525. Consumers also completed a competitive bid for storm contractors in 2023 which allowed it to secure "46 vendors with more than 1,300 crews under contract to respond to storms," with the vendors ranked from lowest to highest in cost so that the company can utilize lowest cost resources first. 5 Tr 2025. Mr. Snider also testified that upon approval in several prior electric cases such as Case Nos. U-20697, U-20963, and U-21389,

Consumers has used a five-year average to determine storm restoration expenses which is not only reasonable but also "a conservative means of estimating the amount of storm restoration expense the Company will incur in the test year, and results in a base rate amount that is significantly less than the Company incurred in each year of the five-year period." 5 Tr 2530.

Mr. Snider testified that Consumers' storm insurance policy was terminated in 2019 "as a result of a 137% increase in policy premiums coupled with a low number of historical occurrences where costs were recovered under the insurance policy[,]" and the company has no future plans to purchase storm insurance "because the potential benefits do not exceed the costs of such insurance." 5 Tr 2519-2520. Regarding technology that supports Service Restoration, Mr. Snider testified that Consumers was requesting $54,000 "to resolve software obsolescence of its integrated Tools for Operations Application ('iTOA')," which is used to schedule and log work management activities on Consumers' HVD system. 5 Tr 2535-2536.

The Attorney General's witness, Mr. Coppola, also used a five-year average of actual expenses from 2019-2023, calculating $124.872 million before adjustments. Exhibit AG-1.33. This was in part due to tree-related power outage data that showed "an average decline of 2.38% over the five-year period." Attorney General's initial brief, p. 181. Using that information, Mr. Coppola's adjustments led the Attorney General to recommend a disallowance of $3.618 million for the projected test year with a service restoration expense of $129.882 million for the projected test year. *Id*., p. 182 (citing Exhibit AG-1.33).

Mr. Coppola also noted two problems with Consumers' proposed expense. The first is that Consumers proposes $2.8 million more in adjusted Service Restoration costs, as shown in Mr. Snider's Figure 1 in his direct testimony, than the Service Restoration costs set forth on line 22 of Exhibit A-106. Attorney General's initial brief, pp. 179-180 (citing 5 Tr 2519). The

EXHIBIT 7

EASEMENT FOR ELECTRIC FACILITIES

SAP# 1030523615
Design# 10609292
Agreement # MI00000018454

Louis T Llames, Trustee of Louis Llames Revocable Trust, dated November 1, 2013, 496 Ault St., Hemlock, MI 48626 (hereinafter "Owner")

for $1.00 and other good and valuable consideration [*exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)*] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter Owner's land (hereinafter "Owner's Land") located in the Township of Richland, County of Saginaw, and State of Michigan as more particularly described in the attached Exhibit A to construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities in, on, over, under, across, and through a portion of Owner's Land (hereinafter "Easement Area") as more fully described in the attached Exhibit B, together with any pole structures, poles, or any combination of same, wires, cables, conduits, crossarms, braces, guys, anchors, transformers, electric control circuits and devices, location markers and signs, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities, whether above or below grade, useful or incidental to or for the operation or protection thereof, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity.

Additional Work Space: In addition to the Easement rights granted herein, Owner further grants to Consumers, during initial construction and installation only, the right to temporarily use such additional work space reasonably required to construct said lines. Said temporary work space shall abut the Easement Area, on either side, as required by construction.

Access: Consumers shall have the right to unimpaired access to said line or lines, and the right of ingress and egress on, over, and through Owner's Land for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder.

Trees and Other Vegetation: Owner shall not plant any trees within the Easement Area. Consumers shall have the right from time to time hereafter to enter Owner's Land to trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area.

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, or on said Easement Area, whether temporary or permanent, natural or man-made, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Ground Elevation: Owner shall not materially alter the ground elevation within the Easement Area without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Exercise of Easement: Consumers' nonuse or limited use of this Easement shall not preclude Consumers' later use of this Easement to its full extent.

Ownership: Owner covenants with Consumers that they are the lawful fee simple owner of the aforesaid lands, and that they have the right and authority to make this grant, and that they will forever warrant and defend the title thereto against all claims whatsoever.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

Date: 03-August-2015

Owner: Louis Llames Revocable Trust

Louis T Llames-Trustee

Acknowledgment

The foregoing instrument was acknowledged before me in Bay County, Michigan,

on August 3, 2015 (Date) by Louis T Llames, Trustee for Louis Llames Revocable Trust,

dated November 1, 2013, for the Trust.

Shelly K. Marshall

Shelly K. Marshall Notary Public

Midland County, Michigan

Acting in Bay County

My Commission expires: Dec. 15, 2018

Prepared By: Jeremy Williams 7/16/2015
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Carrie Main, EP7-437
Business Services
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

EXHIBIT A

Owner's Land

A parcel of land in the Northeast ¼ of Section 28, T12N, R2E, Richland Township, Saginaw County, MI, described as: Beginning at a point 30.00 feet West from the Northwest corner of Lot 9 Block 7 of PC Thomas Addition; thence South 264.00 feet; thence East 30.00 feet; thence South 66.00 feet; thence West 330.00 feet; thence East 300.00 feet to the point of beginning.

Parcel Id: 22-12-2-28-1005-000

Commonly known as: 496 Ault St., Hemlock, MI 48626

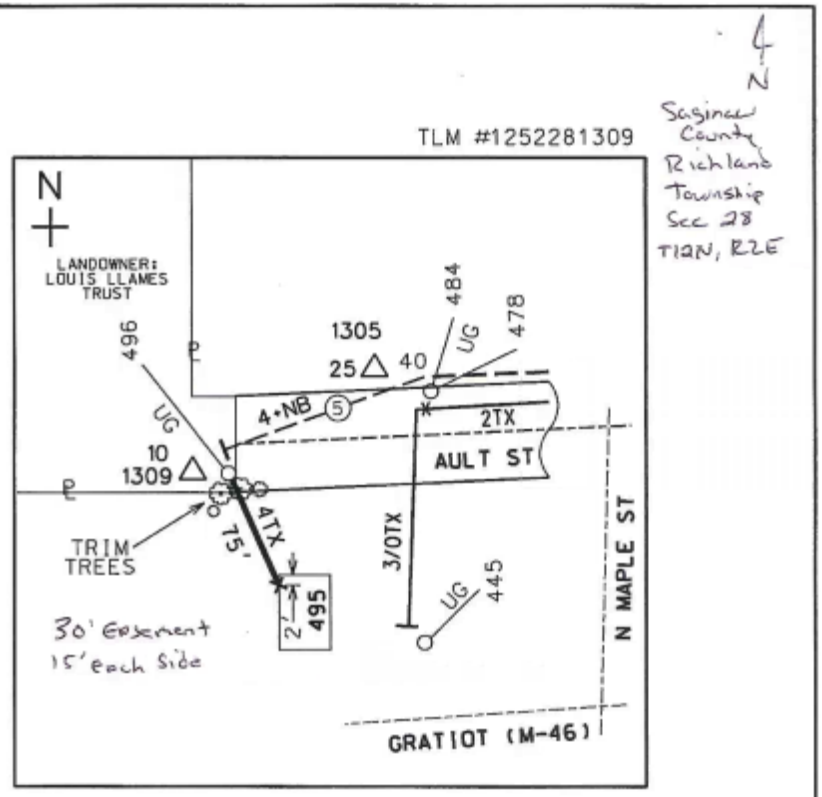
EXHIBIT B

Easement Area

A 30 foot-wide strip of land, being 15 feet on each side of the centerline of the line constructed on Owner's Land, the centerline to be located approximately as shown in the attached drawing.

ADDRESS		
595 AULT ST, HMLK, ECNC NSO POLE BARN		
PROJECT TITLE		
595 AULT RD		
DESIGN NUMBER	AS-BUILT NUMBER	
10609292		
CONSTRUCTION MEASURE NUMBER		
100003416062		
NOTIFICATION NUMBER		
1030523615		
ORDER TYPE	ORDER NUMBER	
ECNC		
MAINTENANCE ACTIVITY TYPE		
NSO		
METER ORDER NUMBER	METER NUMBER	
READ	METER LOCATION	
☒ SET	☐ REMOVE	☐ EXCHANGE
DESIGNED BY	DATE	
SETEMPLE	07/03/15	

Consumers Energy
A CMS Energy Company SERVICE



4
N
Saginaw County
Richland Township
Sec 28
T12N, R2E

SERVICE SKETCH TITLE BLOCK
Form 2804 10-30-2008
7/3/2015 1:11:26 PM d:\cf\backup\wrod\ustn\dgn\10609292.001

M1000000018454

EXHIBIT 8

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to investigate the responses of **CONSUMERS ENERGY COMPANY** and **DTE ELECTRIC COMPANY** to recent storm damage in their service territories.	)	Case No. U-17542

At the January 8, 2014 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

ORDER COMMENCING INVESTIGATION

On December 21 and 22, 2013, a severe ice storm crossed the midsection of Michigan's Lower Peninsula. As a result, an estimated 626,000 customers of Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) lost electric power to their homes and businesses for varying lengths of time. Published reports indicate that some customers remained without power for over 8 days. In addition to the extended outages and an unprecedented number of downed lines, it has been reported that some customers found it difficult to report outages.

Public utilities are allowed to recover the costs associated with tree trimming activities and general maintenance of their distribution facilities through the rate case process. In each rate case, the Commission reviews the utility's request for operations and maintenance expenses and capital spending to determine whether spending is adequate to maintain and improve reliability to

customers. The Commission has an obligation to ensure that the utilities are using these ratepayer supplied funds to provide customers with reasonably reliable service, to protect the public from hazardous downed power lines, and to promptly respond to and restore power to customers suffering from outages. Reports of prolonged power outages raise serious concerns and require review by the Commission. Storms of this magnitude also provide utilities an opportunity to improve their infrastructure, operations, and communications in order to increase resiliency during future events.

Toward that end, the Commission has opened this docket for the purpose of investigating: (1) how the ice storm affected the utilities' distribution systems; (2) how the utilities responded before and during the storm (including information on the number and deployment of utility line crews, Michigan-based contractors, and mutual assistance crews from other states, as well as information on forestry crews); (3) whether any changes could be implemented to reduce the potential for future power outages of the magnitude recently witnessed; (4) whether there is evidence of a failure on the part of either utility to properly maintain its distribution system that could have contributed to the outages experienced during these storms; (5) whether the utilities were properly prepared to receive and respond to customer calls to report outages, any problems experienced on the reporting system during the storm, and whether accurate information was relayed to customers; (6) and whether the utilities sufficiently addressed all public safety concerns associated with downed power lines in a timely manner. The Commission directs Consumers and DTE Electric to each file a report in this docket no later than 5:00 p.m. on February **7**, 2014, addressing these issues.[1]

[1] The Commission's powers do not extend to the regulation or control of any municipally owned electric utility. MCL 460.54.

The public is invited to comment on the reports. Written and e-mail comments may be filed with the Commission no later than 5:00 p.m. on February 21, 2014. All comments should reference Case No. U-17542. Written comments should be sent to: Executive Secretary, Michigan Public Service Commission, P.O. Box 30221, Lansing, Michigan 48909. Comments may also be e-mailed to: mpscedockets@michigan.gov. Documents may be submitted electronically through the Commission's E-Dockets Website at: michigan.gov/mpscedockets. Requirements and instructions for filing can be found in the User Manual on the E-Dockets help page. Documents may also be submitted, in Word or PDF format, as an attachment to an email sent to mpscedockets@michigan.gov. Anyone requiring assistance prior to e-filing may contact the Commission staff at (517) 241-6180 or by e-mail at mpscedockets@michigan.gov. All information submitted to the Commission in this matter will become public information available on the Commission's website and subject to disclosure, and will not remain private.

Thereafter, the Commission Staff (Staff) shall file a report in this docket no later than 5:00 p.m. on March 10, 2014, analyzing the comments and the utilities' filings and recommending potential changes to utility operations or procedures, if such changes are identified. The utilities may thereafter file a response to the Staff's report, no later than 5:00 p.m. on March 24, 2014. At the conclusion of the process, the Commission may propose remedial action, as appropriate.

The Commission's authority to conduct this investigation is provided by statute and its continuing jurisdiction pursuant to the November 20, 1991 order in Case No. U-9916. MCL 460.555 provides, in part, that "The commission shall have power . . . to investigate from time to time the method employed by . . . corporations transmitting and supplying electricity and shall have power to order such improvements in such method as shall be necessary to secure good service and the safety of the public and those employed in the business of transmitting and

distributing such electricity." Pursuant to its authority, the Commission directs DTE Electric and Consumers to cooperate with the Staff in the development of data necessary for review of the utilities' response to the recent electric outages.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company and DTE Electric Company shall each file a report in this docket as outlined in this order no later than 5:00 p.m. on February 7, 2014.

B. Interested persons may file comments on the utilities' reports in this docket no later than 5:00 p.m. on February 21, 2014.

C. The Commission Staff shall file a report in this docket no later than 5:00 p.m. on March 10, 2014, analyzing the comments and the utilities' filings and recommending potential changes to utility operations or procedures, if such changes are identified.

D. Consumers Energy Company and DTE Electric Company may each file a response to the Commission Staff's report no later than 5:00 p.m. on March 24, 2014.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

John D. Quackenbush, Chairman

Greg R. White, Commissioner

Sally A. Talberg, Commissioner

By its action of January 8, 2014.

Mary Jo Kunkle, Executive Secretary

EXHIBIT 9

2006 WL 287404
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

ATTORNEY GENERAL and Department of Environmental Quality, Plaintiffs-Appellants,
v.
ALTERNATIVE FUELS, L.C., Defendant-Appellee.

No. 264075.
|
Feb. 7, 2006.

Before: BANDSTRA, P.J., and FITZGERALD and WHITE, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right the trial court order dismissing their claims against defendant Alternative Fuels, L.C., operator of a scrap tire collection and processing site, under the primary jurisdiction doctrine. [1] We affirm.

In 2001, the Michigan Department of Environmental Quality (MDEQ) denied defendant's scrap tire collection site registration application on the basis that defendant was not sufficiently bonded. Defendant challenged this determination before the MDEQ's administrative hearings office under the Administrative Procedures Act (APA), MCL 24.201 *et seq.* Defendant has since continued to file annual registration applications, all of which have been returned to defendant as "administratively incomplete" and have become part of the contested case. [2] Defendant continued to operate the scrap tire collection site during the pendency of the contested case.

In 2003, plaintiffs brought this action seeking to compel defendant to comply with the bonding, storage, registration, and processing requirements set out in MCL 324.16901 *et seq.,* the provision of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.,* concerning scrap tires. These compliance issues were also raised in the contested case as part of the MDEQ's rationale for denying defendant the license it seeks to continue operating. Plaintiffs also asserted that defendant was operating an unlicensed solid waste facility under MCL 324.11501 *et seq.,* entitling plaintiffs to injunctive relief, civil fines, and enforcement costs. Plaintiffs further asserted that they were entitled to response activity costs, injunctive relief, and civil fines under MCL 324.20101 *et seq.* Plaintiffs also contended that they were entitled to relief under a common law public nuisance theory because defendant created a fire and mosquito control hazard by violating the requirements set out in MCL 324.16901 *et seq.*

The trial court dismissed this case without prejudice based on the primary jurisdiction doctrine. Specifically, the trial court reasoned that the Legislature intended that the MDEQ should apply its expertise in determining a registrant's qualifications for registration/registration renewal and, accordingly, whether the registrant's site was in compliance with the statutory requirements set out in MCL 324.16901 *et seq.* Further, the trial court determined that it should not interfere in the registration process where the Legislature specifically granted the MDEQ the responsibility for overseeing that process, and should defer such matters until the proceedings are completed and reviewable in circuit court; that it should defer to the MDEQ administrative proceedings because defendant is an apparent debtor in possession continuing to operate its facility under an order entered by an administrative law judge (ALJ) and, presumably, a bankruptcy judge; that dismissing the proceedings without prejudice would not inconvenience the parties and would promote judicial and regulatory economy; and that the MDEQ had not yet initiated an administrative proceeding under MCL 24.292(2) of the APA, leading the trial court to conclude that the MDEQ did not assert "that the public health, safety or welfare requires emergency action" despite its current request for injunctive relief.

***2** Plaintiffs argue that the trial court erred in dismissing their case on the basis of the primary jurisdiction doctrine. We disagree. We review de novo the applicability of the primary jurisdiction doctrine as a question of law. *Spect Imaging, Inc v. Allstate Ins Co,* 246 Mich.App 568, 580; 633 NW2d 461 (2001). An issue of primary jurisdiction arises where, although a claim may be cognizable in a court, initial resolution of issues within the special competence of an administrative agency is required. *Travelers Ins*

Co v. Detroit Edison Co, 465 Mich. 185, 197; 631 NW2d 733 (2001). Under the doctrine, the judicial process is stayed pending referral of such issues to the appropriate administrative agency for resolution. *Id.* at 207. Whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency depends on the agency rule at issue and the nature of the declaration being sought. *Id.* at 198. Referral of such issues to an administrative agency does not deprive the court of jurisdiction; rather, it has discretion to retain jurisdiction or to dismiss the case without prejudice if the parties would not be unfairly disadvantaged. *Id.*

There is no fixed formula for determining whether the doctrine of primary jurisdiction applies; each case must be decided on its own facts. *Spect, supra* at 580. However, in determining whether the doctrine is applicable, we first consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. *Id.* We then consider the need for uniformity and consistency in resolution of the issue. *Id.* Finally, we consider whether judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. *Id.*

"[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature," and "[u]se of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity." *Travelers, supra* at 198-199. Here, all of the allegations in plaintiffs' complaint stem from defendant's alleged failure to comply with various provisions of MCL 324.16901 *et seq.* regarding scrap tires. Accordingly, this case would benefit from a prior determination by the MDEQ, with its specialized expertise in this area, in addressing the various allegations raised here by plaintiffs. Indeed, our Supreme Court has noted that "the MDEQ, in administering the NREPA within the executive branch, must undertake decisions grounded in its own expertise." *Henry v. Dow Chemical Co,* 473 Mich. 63, 95 n 25; 701 NW2d 684 (2005). Moreover, because plaintiffs' public nuisance tort claim is based on a dispute over the extent of defendant's responsibilities, which are anticipated by and contained in the scrap tire regulatory scheme, it is a matter incident to the regulation of defendant that falls within the primary jurisdiction of the MDEQ. *Michigan Basic Prop Ins Assoc v Detroit Edison Co,* 240 Mich.App 524, 533-534; 618 NW2d 32 (2000). Accordingly, the first consideration, the need for agency expertise, weighs in favor of deferral of such matters to the MDEQ. See *Rinaldo's Constr Corp v. Michigan Bell Tel Co,* 454 Mich. 65, 75-76; 559 NW2d 647 (1997).

***3** The second consideration, the need for uniformity in deciding matters incident to the regulatory scheme, also weighs in favor of deferral to the MDEQ. See *id.* at 76. The MDEQ, under MCL 324.16901 *et seq.,* was granted broad authority to regulate the entire subject matter of scrap tire facilities. Under MCL 324.16904, the MDEQ is responsible for making an annual determination regarding whether a scrap tire collection site meets the statutory bonding requirements and its consequent registration eligibility. Under MCL 324.16903, the MDEQ is responsible for determining a scrap tire collection site's compliance with numerous specific and detailed statutory requirements. Here, deferral to the MDEQ would promote uniformity and consistency in the application of the scrap tire regulatory scheme, and would eliminate the potential of exposing scrap tire facilities to unanticipated liabilities that the MDEQ may not otherwise recognize. See *Travelers, supra* at 208; *Rinaldo's, supra* at 76.

Finally, the third consideration, whether judicial resolution of the issue will adversely effect the MDEQ's performance of its regulatory responsibilities, also weighs in favor of deferral to the agency. *Spect, supra* at 580. Because of the number and varying nature of scrap tire facilities across the state, the resolution of disputes in circuit court could hinder the MDEQ's responsibilities for administering the scrap tire act as set out by the Legislature. See *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd,* 240 Mich.App 153, 164; 610 NW2d 613 (2000).

Moreover, we find no merit to plaintiffs' assertion that the invocation of primary jurisdiction is inappropriate because this litigation, which would normally be subject to the jurisdiction of the MDEQ, has "advanced to a point where it would be unfair to remit the [party] to another and duplicative proceeding...." *Travelers, supra* at 206 n 19, quoting *White Lake Improvement Ass'n v City of Whitehall,* 22 Mich.App 262, 284; 177 NW2d 473 (1970). Indeed, where the contested case was initiated in 2001 and plaintiffs did not bring this action until 2003, it is this litigation that would be duplicative if allowed to proceed.

The considerations in favor of applying the doctrine of primary jurisdiction favor deference to the MDEQ in this case, and the trial court did not err in concluding that the

MDEQ was the proper forum for plaintiffs' claims. Further, an immediate determination regarding the appropriateness of the relief sought in this action is unnecessary where the MDEQ may summarily suspend defendant's operating license if needed for the protection of the public health, safety, or welfare during the pendency of the proceedings. MCL 24.292(2).

In light of our conclusion that the trial court properly deferred to the primary jurisdiction of the MDEQ, we need not address plaintiffs' remaining arguments concerning the trial court's denial of their motion for summary disposition.

***4** We affirm.

All Citations

Not Reported in N.W.2d, 2006 WL 287404

Footnotes

1 Defendant moved to dismiss this appeal asserting that this Court lacked jurisdiction because the dismissal without prejudice was not a final order pursuant to MCR 7.202(6)(a)(i). This Court denied defendant's motion. *Attorney General v. Alternative Fuels, LC,* unpublished order of the Court of Appeals, entered 9/22/05 (Docket No. 264075).

2 The MDEQ subsequently approved defendant's 2001 registration application.

End of Document

2004 WL 2009260
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Richard J. BAKER, Plaintiff-Appellant,
v.
THE DETROIT EDISON COMPANY, Defendant-Appellee.

No. 246401.
|
Sept. 9, 2004.

Before: OWENS, P.J., and TALBOT and KELLY, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(4). We affirm.

The material facts are not in dispute. On February 25, 2001, a thunderstorm blew tree branches onto a high tension power wire, which then fell on plaintiff's office building starting a fire and causing substantial damage. The local fire department responded to the fire, but, because of the downed power line, the firefighters could not enter the building until one of defendant's employees arrived to turn off the power. The fire department's records indicated that defendant was called at 12:13 a.m. and their employee arrived on the scene at 2:09 a.m..

Plaintiff filed a two-count complaint in circuit court alleging negligence and negligence per se against defendant. In plaintiff's negligence claim, he alleged that defendant breached its duty to (1) maintain and protect its power lines, which included maintaining, inspecting, and trimming trees that were in close proximity to "their customers" property, and (2) respond to a call from a local fire department in a reasonable time. In plaintiff's negligence per se claim, he alleged that "Michigan Statutes and Regulations governing safety rules" for overhead power lines and the trimming of trees around power lines imposed specific duties for the safety and protection of the general public, and defendant breached its duty when it failed to maintain, trim, and remove trees that were in close proximity to power lines. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) [1] alleging that the doctrine of primary jurisdiction required that the action be referred to the Michigan Public Service Commission (MPSC) and the trial court granted this motion.

Plaintiff argues on appeal that the trial court improperly referred the matter to the MPSC because plaintiff's complaint sounded in tort independent of contract. We review de novo a trial court's grant or denial of a motion for summary disposition. *First Public Corp v. Parfet,* 468 Mich. 101, 104; 658 NW2d 477 (2003). Similarly, the applicability of the primary jurisdiction doctrine presents a question of law, which this Court also reviews de novo. *Michigan Basic Property Ins Ass'n v Detroit Edison Co,* 240 Mich.App 524, 528; 618 NW2d 32 (2000).

The primary jurisdiction doctrine pertains to matters "whereby a court defers its own jurisdiction to the jurisdiction of an administrative agency better suited to handle the parties' dispute." *Michigan Basic Property Ins Ass'n, supra* at 529, citing *Rinaldo's Construction Corp v. Michigan Bell Telephone Co,* 454 Mich. 65, 70; 559 NW2d 647 (1997). "[T]he doctrine of primary jurisdiction is one that requires 'referral',' but not necessarily dismissal of an action" and therefore a party may seek judicial review of the MPSC's decision after it has considered a referred claim. *Travelers Ins Co v. Detroit Edison,* 465 Mich. 185, 208; 631 NW2d 733 (2001). Our Supreme Court, in *Rinaldo's, supra* at 71-72, listed the following factors as guidance for a trial court's decision whether to suspend an action in favor of agency review:

***2** First, a court should consider "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue...." Second, it should consider "the need for uniform resolution of the issue...." Third, it should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body. [Quoting Davis & Pierce, 2 Administrative Law (3d ed), § 14.1, p 272.]

In this case, the trial court determined that the MPSC was the proper forum to hear the matter in light of a 1991 Stipulation and Agreement that defendant entered into with the MPSC after the agency held public hearings regarding performance standards for electric distribution systems. The Stipulation and Agreement established standards regarding defendant's communications, reliability of service (which included tree clearance services), and ability to respond to major storms; it also established that defendant would respond to downed wire calls within four hours. Further, the Stipulation and Agreement reflected the MPSC's ongoing interest in defendant's performance by requesting quarterly reports and annual meetings with the MPSC. As such, we find that the trial court properly determined that the MPSC should hear and decide if plaintiff's property damage was a result of defendant's failure to abide by the standards set forth in the agreement. *Dominion Reserves, Inc v Michigan Consolidated Gas Co,* 240 Mich.App 216, 218-222; 610 NW2d 282 (2000).

Furthermore, plaintiff's negligence claims were dependent on the allegation that defendant had breached "Michigan Statutes and Regulations governing safety rules" for overhead power lines and the trimming of trees around power lines that imposed specific duties for the safety and protection of the general public. The meaning and application of rules governing maintenance of overhead power lines, and tree trimming around those lines, by a public utility are matters of specialized knowledge best considered first by the MPSC. *Travelers Ins Co, supra* at 207 ("The MPSC "possesses the degree of expertise with regard to the purpose and effect of the governing tariffs to decide whether the presumptively valid tariff provisions apply to particular facts that do not constitute tortious conduct or a violation of the code or tariff."), quoting *Michigan Basic Property Ass'n, supra* at 533.

The second consideration, the need for uniformity, also favors referring the matter to the MPSC. We are persuaded that exposing defendant to unanticipated liabilities from storms, which are uncontrollable and cause differing degrees of damage, would affect its ability to provide affordable service. We similarly find that the MPSC's ability to regulate electric utilities would be frustrated if liability based on different judicial determinations of appropriate response times to downed wires from storms were established, particularly where the MPSC has already approved a response time of up to four hours.

***3** The third consideration, "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities," also favors referring the matter to the MPSC. In this case, defendant has continuing obligations under the Stipulation and Agreement regarding the maintenance of overhead power wires and is bound to respond to emergency situations within a particular time frame. Its obligations under that agreement with the MPSC are continuously monitored by the agency. Judicial resolution of the claims raised in this case will potentially adversely impact the MPSC's performance of its regulatory responsibilities with regard to its agreement with defendant. The trial court therefore properly determined that while plaintiff's claims may sound in tort, they nonetheless fall within the MPSC regulatory scheme and that the doctrine of primary jurisdiction was properly invoked.

Plaintiff also argues that the trial court improperly denied his motion for reconsideration. We disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration. *Churchman v. Rickerson,* 240 Mich.App 223, 233; 611 NW2d 333 (2000), citing *Cason v. Auto Owners Ins Co,* 181 Mich.App 600, 609-610; 450 NW2d 6 (1989).

Plaintiff argues that the trial court improperly denied his motion for reconsideration because he presented evidence that an independent contractor, who was hired by defendant to perform tree clearance services, may also be liable for plaintiff's property damage. Plaintiff asserts that at the time defendant filed its motion for summary disposition, he was unable to specifically argue that referring the matter to the MPSC was improper because he did not receive any information regarding the specific contractual relationship between defendant and the independent contractor until after the trial court granted the motion.

Based on our review, we find that the record does not support plaintiff's assertion. Defendant submitted evidence that it informed plaintiff, in response to plaintiff's Interrogatory # 25 almost three weeks before it filed the motion, that it hired an outside vendor to perform tree clearance duties. Even without the contract, plaintiff was not prevented from arguing, in his brief in opposition to defendant's motion, that a question of fact remained regarding the MPSC's jurisdiction over a third-party vendor. A motion for reconsideration is used to correct "a palpable error by which the court and the parties have been misled," and not to present new evidence. See MCR 2.119(F)

(3); *Maiden v. Rozwood,* 461 Mich. 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v. Cross & Peters,* 451 Mich. 358, 366 n 5; 547 NW2d 314 (1996). Consequently, we decline plaintiff's invitation to determine whether the MPSC had jurisdiction over the independent contractor. [2]

Affirmed.

All Citations

Not Reported in N.W.2d, 2004 WL 2009260

Footnotes

1 Although defendant raised the issue of primary jurisdiction in its motion for summary disposition under MCR 2.116(C)(8), the trial court determined that it should be considered as a motion under MCR 2.116(C)(4). However, the Michigan Supreme Court has held that the standard of review is unaffected even where primary jurisdiction doctrine is "raised improperly under MCR 2.116(C)(4), [and] the plaintiff's pleadings [do] not affect the standard of review that [is] applied in reviewing the circuit court, or the analysis of the substantive decision." *Travelers Ins Co v. Detroit Edison,* 465 Mich. 185, 205-206 n 18; 631 NW2d 733 (2001).

2 Plaintiff filed a complaint against the independent contractor in circuit court. *Baker v Asplundh Tree Expert Company,* Case No. 03-047707.

2025 WL 2426791
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jerome DUBRULLE, Jennifer Dubrulle, Edward Kerfoot, Ellen Kerfoot, Nicole Norris, Matthew Norris, Chad Haurani, Mona Haurani, Marcy Tayler, Abby Paulson, Andrew Hastings, Marguerite Kaiser, Robert Kaiser, Molly McClanaghan, Ryan Morris, Patrick Shanley, Kelly Shanley, Rhonda Fenderson, Sarah Feldman, Joshua Tucker, Danielle Tucker, and all others similarly situated, Plaintiffs-Appellants,
and
Michelle Busuito and Matthew Howe, Plaintiffs,
v.
DTE ENERGY COMPANY, Miller Pipeline-Michigan LLC, Utility Resource Group LLC, and TMC Alliance LLC, Defendants-Appellees.

No. 367095
|
August 21, 2025, 10:54 AM

Wayne Circuit Court, LC No. 21-009198-NZ

Before: Patel, P.J., and Riordan and Swartzle, JJ.

Opinion

Per Curiam.

***1** Plaintiffs sued defendants, alleging that defendants' actions caused power outages in the Freud Pump Station, resulting in the flooding of plaintiffs' properties. The trial court denied plaintiffs' motion to amend their complaint to add DTE Electric Company as a defendant. Ultimately, the trial court granted defendants' motions for summary disposition under MCR 2.116(C)(8) and denied plaintiffs' motion to strike exhibits that DTE Energy Company and Utility Resource Group LLC (URG) filed with their motions. We reverse and remand for further proceedings.

I. BACKGROUND

According to plaintiffs' third amended complaint (TAC), on June 22, 2021, defendant Miller Pipeline–Michigan LLC, acting as a contractor for DTE Energy or one of its subsidiaries, was engaged in excavation and damaged an underground cable. As a result, power could not be transmitted from the Ludden Substation to the Freud Pump Station, and five of the eight pumps at the pump station became inoperable. On June 25 and 26, 2021, a "rain event" occurred. Plaintiffs purportedly experienced property damage as a result of sewage backups and flooding. The parties dispute the comparative impact of the rain and disabled pumps on plaintiffs' alleged damages, and the admissibility of information about the extent of the rain at this stage of the proceedings, but no parties dispute that there was a damaged cable or power outage, or that it rained on June 25 and 26, 2021.

Plaintiffs originally sued DTE Energy and "John Does 1-5." DTE Energy first moved for summary disposition under MCR 2.116(C)(8) in December 2021, arguing that plaintiffs failed to plead how DTE Energy "fit[ ] into this picture" or owed plaintiffs a duty. The trial court denied DTE Energy's motion, concluding that plaintiffs' complaint sufficiently alleged the facts and elements of plaintiffs' claims. The case was ultimately reassigned to a different trial court judge.

In June 2022, plaintiffs moved for leave to file the TAC. Plaintiffs sought to add Miller Pipeline, URG, TMC Alliance LLC (TMCA), and DTE Electric as defendants, and to remove reference to John Does 1-5. DTE Energy opposed the request, arguing that amending plaintiffs' complaint would be futile. DTE Energy further argued that plaintiffs "improperly conflate[d] DTE Energy and DTE Electric," that neither DTE Energy nor DTE Electric had a contractor relationship with Miller Pipeline or TMCA, and, even if a DTE entity had contracted with one of the subcontractors, any negligence could not imputed to DTE. Following a hearing, the trial court granted plaintiffs' motion to add the proposed defendants, except for DTE Electric. The trial court stated during the hearing that adding DTE Electric would be futile.

The TAC alleged that defendants "were collectively responsible" for either damaging the cable or failing to take reasonable steps to repair the power instrumentalities servicing Freud Pump Station, and, as a result, Freud Pump Station was not fully operational during the "rain event,"

and plaintiffs suffered property damage from the resulting sewage backups. Specifically, plaintiffs alleged that URG had been responsible for marking the power cables and had a duty to mark the infrastructure as URG had indicated that it had. Miller Pipeline, acting as a contractor for DTE Energy or one of its subsidiaries, had damaged the cable, failed to act with reasonable care, locate the cables, or engage in soft-excavation techniques. [1] According to plaintiffs, DTE Energy and Miller Pipeline had a duty to conduct a reasonable investigation to locate the underground power cables near the planned excavation project. Further, DTE Energy and TMCA had a duty to maintain and repair the power infrastructure that serviced the sewage-disposal system, but they had failed to do so. Plaintiff explained that a 2014 agreement, the Energy Delivery Services Agreement (EDSA), provided for a gradual system conversion of Detroit Public Lighting Department's (DPLD) assets, services, and customers to DTE. Under the EDSA, the city of Detroit had contracted with TMCA to perform maintenance repairs on the DPLD system, but TMCA was required to submit proposed work to DTE for review and approval, and DTE made payments to TMCA. Plaintiffs alleged that DTE Energy failed to supervise its contractors, despite being "functionally responsible" for the operation and maintenance of the DPLD system, including the Ludden Substation and its instrumentalities.

***2** Defendants each moved for summary disposition under MCR 2.116(C)(8), each describing the June 25 and 26, 2021 rain as severe, historic, or a "1,000-year storm." Specifically, Miller Pipeline argued that it did not owe a legal duty to plaintiffs and that its actions were not a proximate cause of plaintiffs' damages. In its motion, TMCA also argued that it was entitled to summary disposition because plaintiffs could not demonstrate that TMCA owed them a duty or that TMCA's actions were the cause in fact or a proximate cause of plaintiff's damages. Next, DTE Energy denied that it owed a duty to plaintiffs. In support of its motion, DTE Energy submitted various exhibits, including Great Lakes Water Authority (GLWA) "Talking Points"; slides from a presentation to GLWA by AECOM, an engineering consulting firm; an executive order of Governor Whitmer declaring a state of emergency as a result of the "heavy rainfall"; and a contract purportedly between Miller Pipeline and DTE Gas to demonstrate that DTE Energy had not contracted with Miller Pipeline. Finally, URG argued that it was entitled to summary disposition on the basis of a lack of proximate cause. URG attached exhibits that included the AECOM presentation and the executive order.

Plaintiffs opposed the motions, and they also moved the trial court to strike or exclude the AECOM presentation, GLWA Talking Points, and executive order on the basis that the trial court was not permitted to consider evidence outside the pleadings when deciding defendants' motions made under MCR 2.116(C)(8). Further, the exhibits were "inadmissible, unreliable, and contain[ed] hearsay not subject to any exception." The trial court denied plaintiffs' motion.

After a hearing, the trial court granted defendants' motions for summary disposition. In its opinion, the trial court referred to the June 25 and 26, 2021 rain as an "extraordinary 1000-year rainfall event." The trial court stated that it would treat DTE Energy "as encompassing all of its subsidiaries," which included DTE Electric and DTE Gas. Next, the trial court determined that any duty that DTE Energy owed to plaintiffs arose from the common law. Although the EDSA was "somewhat confusing," and DPLD continued to own the electrical infrastructure, the EDSA "appear[ed] to transfer maintenance of the prior DPLD lines to DTE." Further, it was "clear" to the trial court that a DTE entity "was in control of the electrical infrastructure of the pumping stations." The trial court determined that the damage that plaintiffs suffered "resulted from a series of unfortunate events that coincided with an unexpected torrential rain event" and there was "no connection between" the damaged utility and the damage to plaintiffs' homes. Instead, "the extraordinary 1000-year rainfall event was not reasonably foreseeable and was the superseding cause of the damage done."

Accordingly, the trial court concluded that DTE Energy owed no duty to plaintiffs when the unforeseeable event was the cause of the damage. Additionally, Miller Pipeline was entitled to summary disposition on the basis of a lack of proximate cause because the rainfall was a superseding cause that was not reasonably foreseeable. Likewise, plaintiffs could not establish that URG's actions were a proximate cause of plaintiffs' damages. Finally, according to the trial court, "TMCA was in no way implicated in or connected to any damage suffered by Plaintiffs."

Plaintiffs now appeal. [2]

II. ANALYSIS

A. MOTION TO STRIKE

First, plaintiffs argue that the trial court erred by failing to strike evidence that DTE Energy and URG submitted with their motions for summary disposition. We review for an abuse of discretion a trial court's decision on a motion to strike. *Kalaj v Khan*, 295 Mich App 420, 425; 820 NW2d 223 (2012). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 367; 986 NW2d 451 (2022) (cleaned up).

When deciding a motion made under MCR 2.116(C)(8), a trial court may only consider the pleadings. MCR 2.116(G)(5). In this case, defendants moved for summary disposition under MCR 2.116(C)(8), and, accordingly, the trial court was not permitted to consider information beyond the pleadings. On appeal, DTE Energy argues that the challenged exhibits contained information subject to judicial notice under MRE 201. At the time that the trial court made its decision, MRE 201(b) provided, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Although a trial court may take judicial notice of certain facts, the parties disagree about the amount of rain that occurred and the impact that the rain had on plaintiffs' property damage. Accordingly, the facts were subject to reasonable dispute at this stage of the proceeding. [3]

***3** It was not improper for the trial court to take judicial notice of the *existence* of the executive order when there can be no dispute that the order was issued. See, e.g., *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1; 788 NW2d 679 (2010). Nor do plaintiffs dispute that it rained. It was, however, erroneous for the trial court to consider the content of the order, and the content of the other exhibits, to determine, at this stage of the proceedings, that the rain was a superseding cause of the damages when the facts could not reasonably be said to have been undisputed or capable of accurate determination. See *Freed v Salas*, 286 Mich App 300, 340; 780 NW2d 844 (2009).

B. SUMMARY DISPOSITION

Next, plaintiffs argue that the trial court erred by granting summary disposition to all defendants. This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Sherman v City of St. Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). A trial court may only grant a motion under MCR 2.116(C)(8) "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. "Whether a defendant owes a particular plaintiff a duty is a question of law that this Court reviews de novo." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013).

A negligence claim requires that a plaintiff establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the plaintiff suffered damages; and (4) the breach proximately caused the plaintiff's damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). There can be no liability for negligence if the defendant owed no duty to the plaintiff. *Hills v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). A duty may arise from statute or through common-law principles. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Under the common law, every person has "an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). If the existence of a duty turns on the resolution of a factual dispute, then the dispute must be submitted to the fact-finder. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). "Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court." See *Dawe v Dr Reuven Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 393; 808 NW2d 240 (2010).

Plaintiffs argue that it was improper for the trial court to consider information apart from the pleadings and make factual determinations when granting defendants summary disposition. It does appear, in fact, that the trial court considered the extent and nature of the rainfall, either through

the exhibits that defendants submitted or through information provided in plaintiffs' other lawsuit. Specifically, the trial court determined that "the damage suffered by Plaintiffs resulted from a series of unfortunate events that coincided with an unexpected torrential rain event" and that there was "*no* connection between the damage done to the electric power line and the cause of the damage done to Plaintiffs' homes" (emphasis added). The trial court determined that "the 1000-year rainfall was a superseding cause and was not reasonably foreseeable." This was all information outside the TAC.

***4** This was error. "Michigan is a notice-pleading jurisdiction," *Dobronski v Transamerica Life Ins Co*, 347 Mich App 92, 106; 13 NW3d 895 (2023), and, in this case, plaintiffs adequately put defendants on notice of plaintiffs' claims against them. Plaintiffs were only required to include enough information in their complaint "reasonably to inform the defendant of the nature of the claim against which [it] must defend." *Veritas Auto Machinery, LLC v FCA Int'l Operations*, 335 Mich App 602, 615; 968 NW2d 1 (2021) (cleaned up).

With respect to duty, although there are a variety of factors to consider when determining whether to recognize a duty, "the nature of the relationship between the parties and the foreseeability of the harm are paramount." *Roberts v Salmi*, 308 Mich App 605, 614; 866 NW2d 460 (2014). There is no duty to exercise reasonable care to avoid an unforeseeable harm. See *Babula v Robertson*, 212 Mich App 45, 51-52; 536 NW2d 834 (1995).

The trial court concluded that DTE Energy had no duty to plaintiffs, primarily resting its decision on the unforeseeable nature of the damages and the superseding cause of the rain. Foreseeability is a crucial factor when addressing whether a duty exists. See *Roberts*, 308 Mich App at 53. The trial court's opinion also appears to determine that DTE Energy could not have been a proximate cause of plaintiffs' damages on the basis of superseding rain. There is not, however, enough factual support at this point in the proceedings to determine whether DTE Energy was entitled to dismissal on the basis of duty or proximate cause. See *Veritas*, 335 Mich App at 614. DTE Energy argues that the trial court appropriately determined that the rainstorm was a superseding cause of plaintiffs' damages when "the magnitude of the rainstorm and the infrequency of such an event are beyond dispute." The magnitude of the rain and its impact, however, were in dispute, and the trial court could not determine, at this stage of the proceedings, that no factual developmental could possibly justify recovery. See *El-Khalil*, 934 NW2d at 160.

Moreover, plaintiffs adequately pleaded a relationship between DTE Energy and plaintiffs. The trial court seemed to recognize this, noting that it was "clear" that "DTE[ ] was in control of the electric infrastructure of the pumping stations" and that Miller Pipeline was a DTE contractor. The trial court observed that the EDSA was "somewhat confusing," but it "appear[ed] to transfer maintenance of the prior DPLD lines to DTE."

Despite acknowledging a potential relationship between a DTE entity and plaintiffs, the trial court determined that DTE Energy had no duty to plaintiffs. As discussed below, the trial court erred by not allowing plaintiffs to amend their complaint to add DTE Electric as a defendant. Plaintiffs alleged that DTE Energy, or one of its subsidiaries, was responsible for managing the Ludden Substation and overseeing TMCA's work to ensure that the Freud Pump Station was adequately operational. Further, plaintiffs alleged that a DTE entity approved the excavation project, even though it knew, or should have known, that DPLD cables were nearby; failed to supervise Miller Pipeline's work plan; and failed to take reasonable steps to repair the electrical service despite knowing about the power outage for three days before the forecasted rain. Although DTE Energy disputes these allegations, those questions are not resolvable under MCR 2.116(C)(8). Further, although DTE Energy argues that it cannot be held liable for any negligence by its contractors, see *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004), even if it had contracted with the other defendants in this case, plaintiffs' allegations were sufficient to warrant factual development before this determination is made. Accordingly, plaintiffs adequately pleaded a duty.

***5** DTE Energy also relies on the trial court's opinion in the GLWA case, arguing that plaintiffs "had a full and fair opportunity to litigate the factual predicates for the trial court's ruling" and are bound by that adjudication. The trial court, however, dismissed that case on a motion made under MCR 2.116(C)(7). Although a trial court is permitted to consider record evidence when evaluating claims of governmental immunity, see MCR 2.116(G)(5), it is not accurate to say that plaintiffs have had a full and fair opportunity to litigate the issues in this case, that differ from the claims in plaintiffs' other case, against different defendants, before completing discovery. Further, as plaintiffs

argue, DTE Energy did not claim collateral estoppel in its motion for summary disposition, and the trial court did not determine that it applied. "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). DTE Energy argues that under the concept of "One Court of Justice," see, e.g., *Prawdzik v Heidema Bros, Inc*, 352 Mich 102; 89 NW2d 523 (1958), the trial court was permitted to take notice of the proceedings in plaintiffs' other case. Although a trial court may be permitted to consider that other related records exist, weighing those factual findings in this case is not appropriate, particularly when plaintiffs' other case involved different defendants and factual questions. Therefore, the trial court erred by granting DTE Energy's motion.

The trial court did not address the duties of the remaining defendants, beyond noting that there can be no duty when an unforeseeable event was the cause of the damages, although TMCA and Miller Pipeline properly raised the issue in their motions for summary disposition. As with DTE Energy, however, summary disposition on the basis of duty would have been premature for these defendants.

Turning to proximate cause, the trial court primarily decided the case as to all defendants on the basis that the rain constituted a superseding cause. To establish causation, a plaintiff must prove that a defendant's action was both the cause in fact and a proximate cause of the plaintiff's injuries. See *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* at 163. Proximate cause, or legal causation, "requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim." See *Ray v Swager*, 501 Mich 52, 65; 903 NW2d 366 (2017). More than one proximate cause may contribute to an injury. *Id.* "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was reasonably foreseeable." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). "[B]ecause proximate cause is concerned with the foreseeability of consequences, only a human actor's breach of a duty can be a proximate cause." *Ray*, 501 Mich at 72. A nonhuman force may constitute a superseding cause that relieves a defendant from liability, however, if the intervening force was not reasonably foreseeable. *Id.*

The trial court erred by determining at this stage of the proceedings that the rain constituted a superseding cause, precluding a finding that plaintiffs did not adequately plead causation. There may be no dispute that it rained on June 25 and 26, 2021, but the parties dispute the extent of the rain. Critically, the extraneous records cited by defendants are all outside the pleadings, and the information in those records cannot be judicially noticed for purposes of summary disposition under MCR 2.116(C)(8).

Accordingly, the trial court erred by granting URG's motion on the basis of proximate cause. Plaintiffs properly pleaded that URG responded to the MISS DIG notification and that URG may be liable if they failed to mark the cable, resulting in the power outage at Freud Pump Station and flooding of plaintiffs' properties. It is not unforeseeable as a matter of law, with this lack of evidentiary record, that failing to mark underground utilities could result in the damages that plaintiffs allege here. URG argues that the unprecedented nature of the rain event is not disputable. To argue that the rain was a superseding cause, however, requires factual determinations that some level of rain superseded the effect of the power outages, and those determinations cannot yet be made. As plaintiffs argue on appeal, rain, even heavy rain, is not necessarily unforeseeable, and sewage backups are a foreseeable type of injury to result from disabling a pumping station.

***6** Likewise, the trial court erred by granting Miller Pipeline's motion for summary disposition on the basis of proximate cause. Plaintiffs properly alleged that Miller Pipeline damaged the cable, resulting in the power outages, after failing to locate the cable or use soft-excavation techniques. It was erroneous to determine at this point that no factual development could support plaintiffs' well-pleaded claims against Miller Pipeline.

Finally, plaintiffs properly pleaded causation as it related to TMCA. Specifically, plaintiffs alleged that TMCA undertook the duty to repair the power instrumentalities, but failed to do so in a timely manner, and the resulting inoperability of the Freud Pump Station pumps caused plaintiffs' damages. TMCA disputes that plaintiffs can establish either cause in fact or proximate cause, but little is known at this stage

of the proceedings about what actions TMCA took toward making the repairs and what impact TMCA's actions had on the Freud Pump Station remaining disabled by the time of the rain. As TMCA argues on appeal, proximate cause does not always need to be determined by a jury. See *Babula*, 212 Mich App at 54. It is possible that, following discovery, the trial court will determine that plaintiffs have failed to raise a genuine question of material fact on the issue. At this point, however, plaintiffs have put TMCA, and all defendants, on notice of the claims against them. Further, as plaintiffs argue on appeal, defendants blame each other for plaintiffs' damages, but multiple tortfeasors may be liable for a common injury. See *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 56; 693 NW2d 149 (2005). Plaintiffs are entitled to engage in discovery regarding their well-pleaded allegations.

C. MOTION TO AMEND

Finally, plaintiffs argue that the trial court erred by denying their motion to add DTE Electric as a party. This Court reviews for an abuse of discretion a trial court's decision regarding a motion to amend pleadings. *Charter Twp of Pittsfield v Washtenaw Co Treasurer*, 338 Mich App 440, 458; 980 NW2d 119 (2021).

A party has the right to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party." MCR 2.118(A)(1). "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). If a court grants summary disposition under MCR 2.116(C)(8), it must give the parties an opportunity to amend their pleadings, unless amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). A trial court should ordinarily grant a motion to amend, and should only deny a motion to amend on the basis of "(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, [or] (5) futility." *Id*. (cleaned up).

First, DTE Energy argues that plaintiffs lack standing to challenge the trial court's denial of their motion to add DTE Electric as a defendant because the trial court treated DTE Energy and its subsidiaries as one party, and, accordingly, plaintiffs were not aggrieved by the decision. An appellant may, however, "raise issues on appeal related to prior orders." *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) (cleaned up). Further, because the pleadings were sufficient to survive defendants' motions for summary disposition under MCR 2.116(C)(8), the question of DTE Energy's and DTE Electric's involvement will be relevant on remand. The trial court found that adding DTE Electric would be futile, but DTE Energy has argued that plaintiffs were conflating DTE Energy and DTE Electric, and that DTE Energy was not a party to the EDSA or otherwise close enough to the events to be held liable. Adding DTE Electric will permit the proper parties to engage in discovery and litigation.

***7** Therefore, adding DTE Electric at this stage of the proceedings would not be futile. The trial court did not address the remaining bases for denying a motion to amend, but there is also no evidence that there was undue delay or that plaintiffs acted in bad faith by not first naming DTE Electric as a defendant. See *Weymers*, 454 Mich at 658. Further, there is no evidence that there were repeated failures to cure deficiencies, or that that there would be undue prejudice to DTE Energy, DTE Electric, or any other defendant to allow the amendment. See *id*. Accordingly, the trial court erred by denying plaintiffs' motion for leave to amend to add DTE Electric as a party.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2025 WL 2426791

Footnotes

1 Under the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq*., "soft excavation" is "a method and technique designed to prevent contact damage to underground facilities, including, but not limited to, hand-digging, cautious digging with nonmechanical tools, vacuum excavation methods, or use of pneumatic hand tools." MCL 460.723(bb).

2 These plaintiffs have also sued the GLWA and involved cities in a separate case. The trial court dismissed those claims under MCR 2.116(C)(7) on the basis of governmental immunity. An appeal of that order is pending.

3 This does not necessarily foreclose defendants from arguing that there is a lack of a genuine question of material fact in a motion for summary disposition made under MCR 2.116(C)(10) following discovery.

2003 WL 21130167
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Stephen D. EVANS and Ernest G. Nassar, Plaintiffs-Appellants,
v.
DETROIT EDISON, Defendant-Appellee.

No. 239077.
|
May 15, 2003.

Before: MARKEY, P.J., and CAVANAGH and HOEKSTRA, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right the trial court's grant of summary disposition in defendant's favor on the ground that the Michigan Public Service Commission (MPSC) had primary jurisdiction over this action against defendant, a public utility. We affirm.

In July of 1998, a thunderstorm caused tree damage, downed power lines, and widespread power outages in plaintiffs' neighborhood and the surrounding areas. Defendant held an easement along the back of plaintiffs' property through which its power lines were located. As a consequence of the magnitude of damage caused by the storm, defendant implemented its catastrophic storm response procedures which included its policy to cut tree debris into manageable sizes and leave it in the easement for removal by the property owner. When performing routine power line clearance maintenance, defendant removes associated tree debris. However, when defendant responds to catastrophic storm damage its "crews must work quickly to remove downed wire hazards and restore power to thousands of customers;" therefore, such debris is left to be disposed of by the property owner.

Plaintiffs filed the instant "class" action after they were required to gather and move such debris to their street-side curb for removal by the Department of Public Works. Plaintiffs claimed that they were injured "by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." Plaintiffs requested the lower court to "enter an order compelling Defendant to change its maintenance policy subsequent to 'storm damage' of not removing maintenance debris from property burdened by or abutting easements carrying Defendant's electrical transmission lines, to one of removal of cut or fallen tree parts and other debris in all maintenance procedures without distinction, restoring property of Plaintiffs and members of their class to a status quo ante condition ." Plaintiffs also requested that the court grant "other relief as may be deemed just and equitable," as well as costs and attorney fees.

In response to plaintiffs' complaint, defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), arguing that the doctrine of primary jurisdiction applied and required the trial court to defer the action for adjudication by the MPSC, the administrative agency with exclusive regulatory authority over public utilities. See M.C.L. § 460.6. In response to defendant's motion, plaintiffs argued that their complaint sounded in tort and, thus, the doctrine of primary jurisdiction was inapplicable. The trial court agreed with defendant that plaintiffs' "storm debris policy" claim, which sought to compel defendant to modify this policy, must be filed with the MPSC. The trial court stayed plaintiffs' damage claim contingent on plaintiffs filing their claim with the MPSC within forty-five days, after which, if plaintiffs failed to file, the entire action would be dismissed without prejudice upon defendant's motion. Thereafter, plaintiffs failed to file their claim with the MPSC and their complaint was dismissed. Plaintiffs appeal.

***2** Plaintiffs argue that the trial court, as a court of general jurisdiction, was the proper forum to adjudicate plaintiffs' claims. We disagree. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). The applicability of the primary jurisdiction doctrine is, likewise, reviewed de novo on appeal as a question of law. *Michigan Basic Prop Ins Ass'n v Detroit Edison Co,* 240 Mich.App 524, 528; 618 NW2d 32 (2000).

In their complaint, plaintiffs claimed that defendant's maintenance procedures included "negligently and arbitrarily dumping ... debris" on "the property of plaintiffs and others of their class" causing them to be "damaged by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." However, plaintiffs' claim arose after a storm struck their area and defendant implemented its catastrophic storm response procedures which provided that cut tree debris be left in the easement for removal by the property owner. Therefore, any "negligent" and "arbitrary" dumping of tree debris by defendant occurred as a consequence of its catastrophic storm response policy.

MCL 460.6 provides, in pertinent part:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state.... The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities....

The doctrine of primary jurisdiction recognizes this broad grant of authority to the MPSC and applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body...." *Travelers Ins Co v. Detroit Edison Co,* 465 Mich. 185, 197-198; 631 NW2d 733 (2001) (citations omitted).

As a public utility, defendant is subject to the jurisdiction of the MPSC and must abide by the administrative rules promulgated by the MPSC. See 1992 MR 10, R 460.2101. Under MPSC Rule 505, defendant was required to "adopt a program of maintaining adequate line clearance" that included tree trimming. 1996 MR 4, R 460.3505. Defendant claims that its catastrophic storm response policy was adopted, pursuant to 1992 MR 10, R 460.2105, as part of its line clearance program. MPSC Rule 5 provides:

> A utility may adopt additional rules governing relations with its customers that are reasonable and necessary and that are not inconsistent with these rules. The utility's rules shall be an integral part of its tariffs and shall be subject to approval by the commission. [Rule 460.2105.]

***3** Whether defendant's catastrophic storm response policy was appropriately adopted as part of its mandated line clearance program is the decisive question presented by plaintiffs' case and is properly within the jurisdiction of the MPSC.

In determining whether a court should defer to an administrative agency under the doctrine of primary jurisdiction, the court generally considers (1) "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue," (2) "the need for uniform resolution of the issue," and (3) "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." *Rinaldo's Const Corp v. Michigan Bell Tel Co,* 454 Mich. 65, 71; 559 NW2d 647 (1997) (citation omitted). Here, all three criteria weigh in favor of deferral to the MPSC. First, defendant was allegedly acting under the MPSC's mandate that it implement a line clearance program when it developed and instituted its catastrophic storm response policy, implicating the MPSC's unique expertise on its regulatory scheme. Second, the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers, as well as on defendant's storm response efforts. Third, plaintiffs' case implicates the MPSC's regulatory responsibilities in that it presents an issue relating to defendant's "obligations to [its] customers as governed by the regulatory scheme." *Michigan Basic Prop Ins Ass'n, supra* at 538. Therefore, we agree with the trial court that the MPSC was the proper forum to adjudicate plaintiffs' claim against defendant. Consequently, we also agree with the trial court's decision to stay further

proceeding until the MPSC rendered its decision as to whether defendant's catastrophic storm response policy comported with its regulatory scheme. Accordingly, because plaintiffs failed to file their action with the MPSC, summary disposition was properly granted in defendant's favor.

Affirmed.

All Citations

Not Reported in N.W.2d, 2003 WL 21130167

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